

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
 SUPERIOR COURT  
 YAVAPAI COUNTY, ARIZONA  
 FOR THE COUNTY OF YAVAPAI

2011 DEC -6 AM 9:57

SANDRA H. MARKHAM, CLERK

CV: ~~Jacqueline Harkness~~

STATE OF ARIZONA, )

Plaintiff, )

vs. )

Case No. V1300CR201080049

JAMES ARTHUR RAY, )

Defendant. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-FOUR

JUNE 10, 2011

Camp Verde, Arizona

**ORIGINAL**

REPORTED BY  
 MINA G. HUNT  
 AZ CR NO. 50619  
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2 FOR THE COUNTY OF YAVAPAI

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4 STATE OF ARIZONA, )  
5 Plaintiff, )  
6 vs ) Case No. V1300CR201080049  
7 JAMES ARTHUR RAY, )  
8 Defendant. )  
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15 BEFORE THE HONORABLE WARREN R DARROW  
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25 MINA G. HUNT  
AZ CR NO. 50619  
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1 Proceedings had before the Honorable  
2 WARREN R. DARROW, Judge, taken on Friday, June 10,  
3 2011, at Yavapai County Superior Court, Division  
4 Pro Tem B, 2840 North Commonwealth Drive,  
5 Camp Verde, Arizona, before Mina G. Hunt, Certified  
6 Reporter within and for the State of Arizona.  
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1 APPEARANCES OF COUNSEL:

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4  
1 P R O C E E D I N G S  
2 (Proceedings continued outside presence  
3 of jury.)  
4 THE COURT: The record will show the presence  
5 of Mr. Ray and the attorneys.  
6

7 Mr. Kelly --  
8 MR. LI: This afternoon.  
9 THE COURT: Okay.

10 And Mr. Li and Ms. Seifter are present.  
11 And then the state is represented by Ms. Polk and  
12 Mr. Hughes.

13 And there were some legal matters that  
14 were mentioned. I know that there still is the  
15 question of the defendant's proposed exhibits  
16 relating to excerpts. But I -- I want to discuss  
17 the other matters.

18 Mr. Kelly or Ms. -- I'll ask the state  
19 first.

20 Ms. Polk, did you have other things to  
21 raise?

22 MS. POLK: No, Your Honor.

23 THE COURT: Okay. Then, Mr. Kelly.

24 MR. KELLY: Judge, at least initially I -- I  
25 believe there are several matters. We would like  
to eventually perhaps get to the point of being

1 able to identify when closing arguments would take  
2 and then the jury instructions associated with  
3 those closing arguments. That would be our goal  
4 today, if that's at all possible.

5 I don't know how far the Court is in  
6 regards to drafting some proposed jury  
7 instructions. We're very close to submitting some  
8 suggested jury instructions based on the evidence  
9 presented throughout the course of trial. And --  
10 and that's our primary focus today.

11 I must say there are some other legal  
12 issues that we'd like to discuss with the Court.  
13 And first of all, Judge, I think it's important to  
14 put on the record what we have perceived as another  
15 Brady violation.

16 And I'd ask, Judge, for you to think back  
17 to Ms. Dawn Sy's testimony of Tuesday afternoon  
18 this week. During that testimony -- and if I  
19 misstate the facts, I'm not doing so intentionally.  
20 The record will speak for itself.

21 But during her testimony, Ms. Sy  
22 indicated that she had spoke with Ms. Polk sometime  
23 during the latter portion of April 2011. And  
24 during that conversation, and here's the important  
25 exculpatory fact, my recollection is Ms. Sy

1 indicated that she told Ms. Polk that the test she  
2 conducted of the evidentiary items could not detect  
3 organophosphate -- the -- the presence of  
4 organophosphates.

5 Now -- and perhaps factually that's a  
6 better way to state.

7 THE COURT: I did not hear what Mr. Li  
8 interjected.

9 MR. KELLY: Perhaps the better way to state it  
10 is that Ms. Sy's testimony was that her test was  
11 not designed to detect the presence of  
12 organophosphate poisoning. We believe -- my  
13 recollection is based on her testimony that that  
14 information was provided to the State of Arizona  
15 during the latter portion of April 2011.

16 Now, what has not yet been ascertained is  
17 whether or not that information was revealed to the  
18 state before the cross-examination of  
19 Detective Diskin. If so, in addition to the Brady  
20 violation, there would be a significant issue in  
21 regards to the right of confrontation. Because  
22 during my cross-examination Detective Diskin and I  
23 discussed these tests, and I did not have that  
24 information available during that  
25 cross-examination.

1 If -- if the disclosure happened after  
2 Detective Diskin, we would argue that it was  
3 still -- the knowledge itself was in the possession  
4 of the State of Arizona since Ms. Sy is employed by  
5 the Arizona Department of Public Safety for some 18  
6 months before the cross-examination of  
7 Detective Diskin. So it still present a Sixth  
8 Amendment right of confrontation problem as well as  
9 a Brady violation.

10 I would note for the record that there  
11 was no report provided from the State of Arizona in  
12 regards to this information. There was no  
13 reference at any portion -- throughout the course  
14 of this trial, there was no disclosure, and, of  
15 course, it is potentially exculpatory and would fit  
16 under the umbrella of Brady.

17 I recall Ms. Sy's testimony to be  
18 sequentially, Judge, in terms of her conversations  
19 with the State of Arizona, that she had a telephone  
20 conversation with Ms. Polk where that information  
21 was discovered, that she met with Mr. Hughes here  
22 in the courthouse and was excused as a witness one  
23 afternoon, and then a -- a third conversation with  
24 Ms. Polk when -- during which she was released from  
25 the subpoena and told that she was not going to be

1 needed during the testimony.

2 Judge, we have argued since the Brady  
3 violation relating to the Haddow report that there  
4 must be some type of remedy to protect the  
5 due-process rights of Mr. Ray. And if those facts  
6 are correct, Judge, I believe that that constitutes  
7 Brady violation.

8 So the question, then, is what is the  
9 appropriate remedy? And we would suggest at this  
10 late date, and I have not consulted with Mr. Li  
11 whether to renew our motion for mistrial, but at a  
12 minimum, as we've submitted earlier, there should  
13 be some type of jury instruction to the jury  
14 relating back to the Court's finding that there was  
15 a Brady violation as it related to Mr. Haddow and  
16 now we have, more recently, another Brady violation  
17 relating to the testimony of Detective Diskin and  
18 Ms. Sy.

19 So that's one issue we'd like to discuss,  
20 Judge. And I have outlined what I believe to be  
21 factually correct and would submit this issue to  
22 the Court and urge the Court to find yet another --  
23 on the record another Brady violation.

24 And here's the importance. Because,  
25 again, my recollection is not perfect and the

1 record speaks for itself. But I recall a sequence  
2 of questioning on cross-examination with  
3 Detective Diskin in which the detective said  
4 something to the effect that -- something like  
5 these tests that were conducted didn't show the  
6 presence of organophosphates.

7 If -- if that's the case, then this jury  
8 has been mislead as to what the actual evidence is,  
9 and that needs to be corrected through a jury  
10 instruction.

11 THE COURT: And you haven't checked the  
12 transcript on that? I ask because often you -- you  
13 do.

14 MR. KELLY: Yeah. And -- and we tried to but  
15 things have kind of rapidly been developing here in  
16 the last few days, and I don't want to misstate  
17 anything.

18 But to answer your question directly, no.  
19 We have not checked the transcript as it relates to  
20 Detective Diskin's testimony relating to the DPS  
21 crime lab reports.

22 THE COURT: Mr. Hughes, Ms. Polk.

23 MS. POLK: Your Honor, first, I'd like to  
24 clear up that characterization. Because I don't  
25 believe it's accurate. The testimony from

1 Ms. Dawn Sy was that in a pretrial telephonic  
2 meeting with both Detective Diskin and me, she told  
3 us that she doesn't know if her method of testing  
4 would test for organophosphates.

5 She never made -- she never testified on  
6 the stand, nor did she ever represent to us, that  
7 her testing would not detect. It was simply that  
8 she didn't know whether or not it would test.

9 I -- with respect to the representation  
10 that Detective Diskin on the stand testified that  
11 the test from DPS did not show organophosphate  
12 poisoning, I don't recall that testimony. I don't  
13 recall asking. But I would rest on whatever the  
14 transcript says in that regard.

15 Let me put into context this conversation  
16 with -- with Dawn Sy. The state first of all had  
17 noticed Dawn Sy as a witness, and in April when  
18 Detective Diskin and I contacted her, it was in  
19 preparation for her trial testimony. It was after  
20 the defense had already interviewed her.

21 And the defense had interviewed Dawn Sy  
22 in June of 2010. During that interview they did  
23 not ask her anything about organophosphates. And  
24 that was consistent with the defense strategy to  
25 keep secret from the state this defense that it was

1 organophosphates that caused the death.

2 And as the Court knows, the defense  
3 interviewed many, many witnesses throughout this  
4 trial -- all the expert witnesses, all the  
5 detectives -- and intentionally did not ask anybody  
6 about organophosphates.

7 They had full access to Dawn Sy. They  
8 interviewed her in June of 2010 and intentionally  
9 did not ask her anything about organophosphates.  
10 They then sprang upon the state in the opening  
11 statement this idea that somehow organophosphates  
12 were at play.

13 Although the defense had generally  
14 noticed as a defense causation, all of their  
15 questions of -- of witnesses focused on dehydration  
16 and lack of core temperature. And certainly that  
17 lack of disclosure to the state violates the spirit  
18 of Rule 15, the strategy to keep secret from the  
19 state organophosphates.

20 But my -- my point is, Your Honor, that  
21 they had full access to Dawn Sy. They specifically  
22 intentionally did not ask her about  
23 organophosphates and whether or not her machines  
24 would test. When they raised that -- the issue of  
25 organophosphates in their opening statement, then,

1 as you know, the state did try to do what we could  
2 to find out about organophosphates.

3 And in preparing Dawn Sy for her  
4 testimony, which is that telephonic meeting that  
5 Detective Diskin and I had with her, we asked her  
6 about organophosphates. And her response was  
7 simply that she doesn't know if her method of  
8 testing would test. And that's consistent with  
9 what she testified on the stand. The defense now  
10 wants to make that out into a Brady violation.

11 I would remind the Court that under Brady  
12 versus Maryland, the defendant only has a  
13 due-process right to disclose material, exculpatory  
14 evidence, that the standard for whether Brady  
15 requires disclosure is if the evidence is material  
16 to the issue of guilt or innocence, not whether the  
17 impact of undisclosed evidence has any impact on  
18 the defendant's ability to prepare for trial, that  
19 evidence is material for the purposes of Brady only  
20 if there is a reasonable probability that had the  
21 evidence been disclosed to the defense, the result  
22 of the proceeding would have been different.

23 A reasonable probability is a probability  
24 sufficient to undermine confidence in the outcome.  
25 And in determining materiality, the undisclosed

1 evidence is to be taken and analyzed as a whole and  
2 not piece by piece.

3 I would also remind the Court that  
4 Detective -- that -- that Dawn Sy testified that we  
5 had that telephonic meeting with her in April, that  
6 after that we issued her the subpoena, that we  
7 brought her here to testify, and that it was a  
8 result -- I think the Court understands that a  
9 result of time that we did not end up calling her,  
10 in addition to the fact that her report did come  
11 in.

12 We were going to call her to introduce  
13 her report through Detective Diskin -- through  
14 Dr. Dickson's testimony. The report was admitted,  
15 and -- and thus, we decided as we were whittling  
16 down our witnesses in the end that we didn't need  
17 to call her after all because we had gotten her  
18 report in and witnesses were testifying about it.

19 But I would draw the Court's attention to  
20 the fact that Dawn Sy did reveal to the state  
21 through her testimony that the defense met with her  
22 again. They didn't -- they don't have to go  
23 through us. They were calling her as their witness  
24 at that point. But clearly through her testimony  
25 it was revealed that she did have a telephonic

1 meeting with Ms. Do and there was additional  
2 information that was discussed in that meeting,  
3 including Dawn -- Dawn Sy testifying about  
4 additional research she had done about the  
5 chemicals and what other products they're in that  
6 had not been disclosed to the state.

7 But two opportunities, then, that the  
8 defense had, two times that they interviewed Dawn  
9 Sy. They know that this defense -- their defense  
10 was focusing on organophosphates and their decision  
11 not to -- at least in that first interview, not to  
12 ask her about organophosphates.

13 We don't know what Truc -- what Ms. Do  
14 discussed with Dawn Sy in that second interview,  
15 which was apparently sometime last week because  
16 that interview took place without inviting the  
17 state.

18 And then, finally, Your Honor, the -- if  
19 the defense feels that somehow this is relevant,  
20 they have the opportunity to call Detective Diskin  
21 to the stand. They have not rested, and they can  
22 call Detective Diskin to the stand, and they can  
23 ask him whatever about this information they feel  
24 is relevant and that they want the jury to know.

25 There is no case law to support the

1 giving of a jury instruction in this situation.  
2 And I would ask that the Court deny this request  
3 for some sort of jury instruction on this issue.

4 THE COURT: Thank you.

5 Mr. Kelly.

6 MR. KELLY: Judge, I -- I know that this Court  
7 is fully aware of the legal standards articulated  
8 by Brady and its progeny. I believe that the  
9 standard articulated by the state has been refined  
10 and overruled by Bagley and Kyles. And you have  
11 been -- there have been briefs submitted in this  
12 case earlier as it related to Haddow. And I  
13 believe you applied the correct standard, so I'd  
14 submit that issue to the Court.

15 I -- I would simply say that this fact  
16 that we have kept secret from the state its own  
17 evidence is ridiculous. It's -- it implies  
18 ignorance.

19 And if you recall during the  
20 cross-examination of Detective Diskin, I have the  
21 little pictograph for the jury that showed all the  
22 evidence in which -- all of it with the exception  
23 of Dr. Paul is the state's evidence and they had  
24 available to inquire and determine whether or not  
25 organophosphates should be excluded as a cause of

1 death long before Mr. Li's opening statement some  
2 17 months later. So that's just absolutely absurd  
3 that somehow we have violated Rule 15 and kept  
4 secret from the state its own evidence.

5 And I think it begins with Exhibit 172,  
6 which is the EMS provider on October 8. And then I  
7 had showed each category of evidence, including the  
8 state's own medical examiners, the emergency room  
9 physicians treating the victims in this case, the  
10 toxidromes referenced, et cetera, up to and  
11 including the substance which is used as an inert  
12 ingredient. I think it's 2-EH is the shortened  
13 term for 2-ethyl-1-alcohol. I may have misstated  
14 it. But that's the state's evidence.

15 So to sit here and say that we kept  
16 something secret, Judge, is beyond comprehension.  
17 The real issue is that, again, under Brady -- you  
18 know -- if you have evidence that is potentially  
19 exculpatory and you -- you refuse to reveal that to  
20 the defense, that is the violation.

21 And -- and again, given the state's own  
22 recollection of what happened factually, doesn't  
23 know if it would test, that's very similar to the  
24 refinement provided to me by Mr. Li. That's the  
25 exculpatory information that I should have had

1 before I cross-examined Detective Diskin. That's  
2 the issue. And -- and that cannot be cured now by  
3 simply calling Detective Diskin in our case in  
4 chief.

5 As you well know, Judge, if we were to  
6 call Detective Diskin, under the Arizona Rules of  
7 Evidence, cross-examination would be unlimited. So  
8 even though I may want to focus on what he  
9 understood that test to be and why he didn't follow  
10 up on leads relating to the 2-EH on  
11 cross-examination, the state now could ask him any  
12 question.

13 And -- and thus, that would be, I would  
14 submit, ineffective assistance of counsel if we  
15 believe that that's the way to cure this problem.  
16 It's not. The way to cure the problem is first of  
17 all, identify it to make a determination as to  
18 whether it is a Brady violation and then discuss  
19 the remedy.

20 And -- and this is not the first go  
21 around. So this isn't some minor problem in terms  
22 of due-process rights of Mr. Ray. It seems to be  
23 exacerbated over time. And we have some other  
24 issues today that I would submit and add --  
25 continue to add to that due-process concern that we

1 have in terms of our ability to effectively  
2 represent Mr. Ray.

3 So, again, I had suggested a jury  
4 instruction, Judge. The state made a comment that  
5 there's no case laws to substantiate a jury  
6 instruction in this regard. I said it didn't work.  
7 I don't know whether there is or is not.

8 THE COURT: There were cases cited in a prior  
9 brief suggesting an instruction can be given in a  
10 Brady situation. I recall that -- that mentioned.

11 With regard to this particular situation,  
12 I don't see this the same as the Haddow situation  
13 at all. Haddow, to me, seemed very clear. There  
14 were some timing issues there that I'm concerned  
15 about very much to this day.

16 And with regard to this, Mr. Kelly, this  
17 issue, there was an interview -- I may have these  
18 dates a little off. Counsel can correct me. But  
19 there was an interview of Dr. Paul, I think on  
20 January 31st or toward the end of January. The  
21 report came out in January '10. And even in the  
22 report it's not mentioned that he was concerned  
23 about this organophosphate problem. And then I  
24 think it's the end of January that it's finally  
25 mentioned that this is something that can be looked

1 at.

2 I gave the special instruction during the  
3 trial about burden of proof and making sure that  
4 the jury understands that. Just looking at all the  
5 circumstances here, I -- I just -- I don't see  
6 Brady.

7 If it -- there's a fact that's still  
8 outstanding, though. And that is what  
9 Detective Diskin's testimony was. No one is sure  
10 of that.

11 MR. LI: Your Honor, Miriam -- Miriam is  
12 checking right now on the -- on the computer.

13 THE COURT: I'm just going to leave it at  
14 this. Based on what I see now, I don't see a Brady  
15 violation. And I think in any event there are --  
16 would be ways to -- to remedy if the testimony of  
17 Detective Diskin was somehow misleading.

18 And I -- Mr. Kelly, maybe I didn't catch  
19 your argument completely. But I don't think that  
20 putting -- if Detective Diskin were to testify in  
21 the defense case, it's not going to open up  
22 everything that Detective Diskin's testified about  
23 before. It's just is in the defense case, if  
24 Detective Diskin is called back in the defense  
25 case. It's not a chance to bring out every

1 positive thing that was said on cross-examination.  
2 That -- that -- that wouldn't be -- it wouldn't be  
3 permissible.

4 So cross-examinations can't range  
5 everywhere in that case, Mr. Kelly.

6 MR. KELLY: Judge, here's my point. I'll be  
7 more direct. Mr. Li has argued for about an hour  
8 and ten minutes what we believe to be defects in  
9 the state's case. And you did not find them  
10 sufficient to grant a Rule 20.

11 But I believe that it would be poor  
12 practice for defense attorneys to put  
13 Detective Diskin on the witness stand, ask him some  
14 questions about 2-EH and the ability of the DPS  
15 crime lab to test for that substance and then open  
16 the door on cross-examination allowing the State of  
17 Arizona to settle up some of the concerns  
18 articulated in our Rule 20 brief and -- and  
19 Mr. Li's argument. That was our specific concern.  
20 It wasn't just wide open and start talking about --  
21 you know -- the things that we've covered during  
22 the direct testimony.

23 So, Judge, I -- I believe the record is  
24 made. Again, I appreciate the opportunity perhaps  
25 to discuss later today the exact conversation

1 between Detective Diskin and I.

2 But -- but truly, Judge, here's the real  
3 problem that we face as it relates to Brady. If I  
4 may continue?

5 THE COURT: Yes.

6 MR. KELLY: Judge, in the brief filed by the  
7 State of Arizona on Rule 20, the response to the  
8 defendant's motion for judgment of acquittal, on  
9 page 6, the state writes -- and -- and I believe  
10 this was very, very consistent to Ms. Polk's oral  
11 argument provided to the Court.

12 And the state writes, the evidence also  
13 shows that the air inside the sweat lodge was  
14 compromised due to carbon dioxide, high humidity,  
15 and lack of circulation.

16 The -- I think, Judge, that it would be  
17 undisputed that the two acts that my client engaged  
18 in for purposes of causation would be that he  
19 called for and added the rocks to the pit in the  
20 sweat lodge and he added water on those rocks.  
21 That's all we've heard.

22 We've heard arguments and allegations  
23 about my client's statements. But in terms of his  
24 physical acts, that's what he did, put rocks in the  
25 middle, added water on the rocks.

1 My concern with this statement is from a  
2 Brady violation, you found that the failure to  
3 disclose the Haddow report constituted a violation  
4 of Brady and its progeny, which is a constitutional  
5 right and relates to the due-process rights of my  
6 client.

7 And interestingly, Judge, out of this  
8 statement where the state writes, evidence shows  
9 the air inside the sweat lodge was compromised due  
10 to carbon dioxide, if that's the state's argument,  
11 Judge, we would submit that that is exculpatory,  
12 that this jury needs to understand that if they  
13 make that finding that it's an intervening cause  
14 and they must acquit Mr. Ray.

15 And also the second factor mentioned is  
16 high humidity. And I'll admit that the high  
17 humidity is caused by the water being placed on the  
18 rocks.

19 But lastly, the lack of circulation. And  
20 the Haddow report clearly stated that the -- a  
21 contributing factor of death was the design and  
22 construction of the sweat lodge, which the evidence  
23 in this case is -- was conducted at the direction  
24 of Angel Valley's owners and employees. And thus,  
25 if the jury found that lack of circulation caused

1 death, that would be an intervening cause and they  
2 must acquit.

3 So our concern is that the state now is  
4 taking what they perceived to be the inculpatory  
5 aspects of Haddow report and then even though --  
6 and despite your clear ruling that that was a Brady  
7 violation, they're going to use that information to  
8 convict Mr. Ray.

9 Again, Judge, if that's what the  
10 government is going to do in its closing argument,  
11 that is a significant due-process concern. And  
12 in -- In terms of effective representation of our  
13 client, it causes us great concern that that could  
14 somehow be allowed.

15 The State of Arizona argued from day one  
16 that the cause of death is heat stroke. They can't  
17 now take aspects of a report that you found to be  
18 in violation of Brady to supplement that cause of  
19 death. It should be the opposite.

20 And so the first question for discussion  
21 today is -- I -- I can read this in the brief.  
22 Obviously we've not made any closing arguments.  
23 But we'd ask that the government be precluded from  
24 making this type of an argument during closing.

25 And, secondly, that if carbon dioxide or

1 the structure of the sweat lodge caused the death  
2 or organophosphate poisoning or the wood or the rat  
3 poison or any other unknown cause, that's an  
4 intervening cause that exculpates Mr. Ray.

5 THE COURT: Mr. Hughes.

6 MR. HUGHES: Thank you, Your Honor.

7 Your Honor, the state would disagree with  
8 a number of the points that Mr. Kelly made.  
9 Mr. Ray's behavior included more than controlling  
10 the number of rocks that came in and controlling  
11 the amount of water that was put on the fire. He  
12 also controlled the number of participants that  
13 could be involved in the proceeding. He controlled  
14 and encouraged the participants to stay inside.

15 He -- and that's relevant, Your Honor,  
16 because people exhale carbon dioxide, people are  
17 the -- are the source of the carbon dioxide that  
18 was inside. And there was testimony by Dr. Mosley  
19 and by Dr. Dickson about the carbon dioxide that  
20 people are exhaling and how that could create some  
21 of the conditions that are within the sweat lodge.

22 In addition, Mr. Ray controlled the air  
23 flow that could come in by determining how long to  
24 keep the door -- the door open and how long to keep  
25 the door closed. Mr. Ray controlled the ability of

1 fresh air to come inside this tarp-covered  
2 structure by chastising people on the occasions  
3 when the flap -- when not the flap but the tent  
4 edge in the back was lifted up, which would allow  
5 air to go in.

6 In fact, the testimony that we have is  
7 that the people who were directly in that area --  
8 Mark Rock and Dawn Gordon -- where that little flap  
9 opened in the back were relatively unscathed and  
10 came out okay. Whereas, the people otherwise in  
11 that vicinity back there where the testimony was no  
12 fresh air was coming in, suffered illness. So  
13 those are all factors that Mr. Ray controlled.

14 It's certainly reasonable -- again, the  
15 jury is going to be asked to determine a  
16 reasonable-person standard. It's reasonable for a  
17 jury to assume that if you have that many people,  
18 50-some to start with and at least half that  
19 number, I believe the testimony has been, by the  
20 final round, if you put that many people in a  
21 tarp-covered structure for that long, it's  
22 reasonable for the jury to assume that that's a  
23 commonplace thing that Mr. Ray or anybody would  
24 know there could be carbon dioxide problems that  
25 are caused by that.

1 And, again, the information that the  
2 state would be arguing would not be coming from  
3 Mr. Haddow's report, but from the testimony that's  
4 come out at this trial by the medical doctors and  
5 by the participants.

6 Finally, the state has argued and hopes  
7 to obtain a jury instruction on this issue of  
8 creation of peril and the duty of creation of  
9 peril. The Maldonado case is very clear. It cites  
10 the language from Tubbs and explains that  
11 regardless of whether the act, or in this case  
12 Mr. Ray's conduct, was tortious or even innocent,  
13 if his -- if his conduct or if an instrumentality  
14 under his control -- in this case the  
15 instrumentality under his control would be the  
16 sweat lodge -- if that creates harm to somebody and  
17 renders that person to be harmed and unable to care  
18 for themselves, he then has a duty to do what's  
19 reasonably necessary to help those people.

20 And so for that issue alone on the  
21 creation-of-peril duty, the arguments of -- of  
22 Ms. Polk in the Rule 20 motion and the response and  
23 also later arguments and closing argument on those  
24 issues would be entirely appropriate.

25 THE COURT: Mr. Kelly.

1 MR. KELLY: Judge, this is a big problem.  
2 First of all, I do not agree. I believe the only  
3 two things that Mr. Ray controlled is putting the  
4 rocks in the middle and putting the water on the  
5 rocks. The number of participants was dictated by  
6 the number of people who wanted to sign up and  
7 participate. And -- and those people were free to  
8 leave, and we've heard testimony of that. So he  
9 had no control over the number of participants.  
10 It's a marketing result of JRI International.

11 He did control the time of the flap, but  
12 that's not relevant in regards to cause of death  
13 because it's undisputed in this case that people  
14 lifted up the edge of the tarp to get more air if  
15 they wanted circulation. There was some testimony,  
16 I believe, that people actually left the sweat  
17 lodge not exiting through the door. And, finally,  
18 Judge, it's undisputed that people could leave at  
19 any time.

20 So when we talk about an act necessary to  
21 create a cause, the result of which is death, and a  
22 criminal defendant's liability, not these torts  
23 under civil law, the only two acts that -- that  
24 anyone can say Mr. Ray did is put the rocks in the  
25 middle and put water on them.

1 In regards to -- and -- and here's why I  
2 point out that it's such a big problem is -- again,  
3 I wrote that the sweat lodge was compromised due to  
4 carbon dioxide. Obviously, everyone knows that  
5 when you exhale, you exhale carbon dioxide. But  
6 that is remarkably close to my recollection of the  
7 Haddow report and lack of circulation, and that's  
8 specifically what Mr. Haddow spoke of.

9 It was not physiological responses of the  
10 human body as it relates to hypoxia and hyper --  
11 hypercapnia and carbon dioxide and the deprivation  
12 of oxygen. That's what the medical doctors talked  
13 about.

14 What we're talking about is -- in this  
15 sentence is Haddow's report that somehow the  
16 construction of that sweat lodge was a contributing  
17 factor to the victims' deaths, which is  
18 exculpatory, not inculpatory.

19 The danger is -- just listening to  
20 Mr. Hughes is he made a commonplace thing, a  
21 commonplace thing that we all know that you put a  
22 bunch of people in a tight, enclosed place that  
23 there's a risk of carbon dioxide. That's true.  
24 But it's also, as attorneys, we know that it's  
25 required that the State of Arizona in a criminal



1 case establish the culpable state of recklessness  
2 beyond a reasonable doubt.

3 And the problem is jurors are not  
4 educated in the law. When you start making  
5 arguments like commonplace things, then we run the  
6 risk of confusing issues that the jury has to  
7 decide. And the issue they have to decide is  
8 whether or not my client's conduct was reckless as  
9 that term is defined under Arizona law, not whether  
10 there are torts of risk or peril or commonplace  
11 things.

12 And so given that standard, this is a  
13 huge problem. And we had intended in arguing that  
14 actually if it is carbon dioxide, if it is the  
15 structure of the sweat lodge that increases the  
16 levels of carbon dioxide, then you have to find him  
17 not guilty because the state put us on notice for  
18 18 months that it was heat stroke. So that's an  
19 intervening cause.

20 And the reason it's intervening cause is  
21 because there is no way a human being could sit at  
22 a door of a sweat lodge and see molecules of carbon  
23 dioxide floating around in a sweat lodge.

24 You want to talk about commonplace  
25 things, then you're talking about civil liability.

1 And if we're going to talk about the crime of  
2 manslaughter, it's a criminal standard. It's  
3 recklessness. And there's no way that that can be  
4 anything other than an intervening cause.

5 Judge, right -- we haven't gotten to the  
6 proposed jury instructions in this regard. I think  
7 Mr. Li is going to handle those. But my -- my  
8 initial concern when I read this was I -- I know of  
9 your Brady ruling. I've seen Haddow's report. I  
10 read this one sentence, and there's other  
11 references.

12 And it's simply a concern because it's  
13 taking -- in my opinion, when I read that, it's  
14 taking information that you've found to be the  
15 nondisclosure, which was a constitutional  
16 violation, and then using that information against  
17 Mr. Ray. And -- and that's not permissible. And  
18 that's the concern, Judge.

19 MR. LI: Your Honor, if I could just  
20 supplement this particular record with one point.

21 THE COURT: I'm going to let Mr. Hughes.  
22 We'll have another round of this.

23 Go ahead.

24 Mr. Hughes, I'm just letting you know.

25 MR. LI: The one supplement I would make, and

1 this is just in reviewing the record in -- in  
2 preparation for Mr. Paul's testimony and other  
3 issues related to organophosphates. The problem  
4 with this disclosure issue is it's part of a  
5 pattern that isn't just limited to the Haddow  
6 report.

7 I will just note, and this is just for  
8 the record, I received a letter from Mr. Hughes on  
9 May -- March 2nd, the day after I open -- I did my  
10 opening statement. And -- and that letter said  
11 that he had spoken -- and it's in evidence. I  
12 think it's Exhibit 1001 or something like that.

13 That letter says something to the effect  
14 of -- you know -- I -- we talked to somebody at the  
15 lab and -- and that doctor -- or whoever it is --  
16 or technician over there says that the  
17 organophosphate test that -- that we conducted or  
18 that they conducted is not reliable. Okay? So I  
19 got that letter after I did my opening statement.

20 It turns out that they actually had that  
21 information weeks before, or at least -- at least a  
22 week before, either with Dr. Mosley, who had told  
23 them that he thought it was a waste of time and  
24 money to do that. And I believe that they had had  
25 communications -- Mr. Hughes himself had had

1 communications with the lab prior to the letter.  
2 So there was about a week delay. I -- I -- I would  
3 have to go back to the notes to identify exactly  
4 what the delay is.

5 But Mr. Hughes had spoken to this person  
6 but did not notify the defense until after the  
7 opening statement about the fact that they then --  
8 they had tested for the organophosphates but then  
9 were told by a medical examiner that it would be a  
10 waste of time and money because of the passage of  
11 time.

12 And then Mr. Hughes was also told by the  
13 technician or the doctor at the lab that these  
14 tests were unreliable. And that fact was not  
15 disclosed until a day after the case -- the opening  
16 statements started.

17 I just want to put that on the record  
18 because this -- this pattern here is -- is  
19 problematic, and it falls in line with what  
20 Mr. Kelly has been arguing about Ms. Polk's  
21 conversation with Dawn Sy. They have these  
22 conversations where people tell them, well, we  
23 can't do this or we don't know about that, and then  
24 they don't disclose it until either late or  
25 extremely late or not at all.

1 THE COURT: Mr. Hughes, one thing I'd like you  
2 to address right now is what Mr. Li just mentioned  
3 about the sequence with the opening statement being  
4 made and then information being provided about the  
5 testing.

6 MR. HUGHES: Your Honor, with respect to that  
7 issue, there were -- the samples that were sent to  
8 NMS lab were sent in two groups because there were  
9 two different medical examiners' offices involved.

10 The first group, which I believe is the  
11 group that I had the conversation with is Mr. Blum  
12 that's referred to in the letter. The first group  
13 was sent out several weeks before, or if not more  
14 than that, before Dr. Mosley eventually sent his  
15 samples out.

16 The conversation that I had with  
17 Mr. Blum, or Dr. Blum -- I still don't know which  
18 it is -- I recounted to Mr. Li very quickly, within  
19 two or three days of having that conversation with  
20 the -- there's a weekend, I believe, also in that  
21 time. But within a very short period of time,  
22 certainly no more than a week afterwards, having  
23 that communication.

24 The conversation with Dr. Mosley, I  
25 believe, occurred after I had already relayed that

1 information to Mr. Blum. At that point we still  
2 wanted Dr. Mosley to send the test. We were --  
3 quite frankly, were afraid if we told Dr. Mosley  
4 don't send the test, the defense would then make  
5 hay with that with Dr. Mosley on the stand and say,  
6 well, the state told you don't test for  
7 organophosphates. And if you had found an  
8 organophosphate, then that would be exculpatory.

9 Because if you remember the testimony on  
10 the stand was, we don't know if that test is good  
11 or not. But if I found an organophosphate even  
12 after that period of time, it would be highly  
13 relevant to whether the person actually died.

14 In other words, the absence of an  
15 organophosphate means nothing with the passage of  
16 time. But if an organophosphate had been found,  
17 then that would be a very critical fact that would  
18 help the defense. And if I told Dr. Mosley after  
19 learning from Dr. Blum, or Mr. Blum, don't test for  
20 this, I could not imagine any situation where the  
21 defense would not attempt to try and say the  
22 prosecutor told you not to look -- even though it's  
23 unlikely you'd find it there, the prosecutor told  
24 you not to look somewhere for relevant information.

25 That's the sequence of events as I recall

1 them regarding the NMS report and the relaying of  
2 the NMS report.

3 With respect to what Mr. Kelly is  
4 arguing, the state is -- is -- does not intend to  
5 argue the Haddow report in our closing argument.  
6 The issue, though, of carbon dioxide, as I think  
7 the Court noted in one of its rulings, has been  
8 around in this case since the very beginning.

9 Medical records, one of the doctors  
10 refers to carbon dioxide as an issue. In  
11 Dr. Mosley's interview, Dr. Mosley mentioned that  
12 that was his differential diagnosis. And that was  
13 an interview done many, many months, six months or  
14 more, before the trial.

15 Dr. O'Connor, who is the defense ex -- or  
16 a plaintiff's expert in the civil case, prepared a  
17 number of reports that spoke in great deal about  
18 the carbon dioxide issue and believes in his  
19 opinion that that contributed to death in this  
20 case. Those reports were disclosed very early on  
21 in this case as well.

22 And then again at trial we had the  
23 testimony of Dr. Dickson and of Dr. Mosley. And  
24 Dr. Mosley testified to this commonplace  
25 information that the state would be arguing.

1 Mr. Kelly acknowledged that it is common knowledge  
2 that if you pack a bunch of people into an enclosed  
3 place, you're going to have carbon dioxide buildup.

4 That's exactly what Dr. Mosley testified  
5 to. He said because of the -- what he would  
6 presume to be lack of airflow and the number of  
7 people, you'd have the buildup of carbon dioxide  
8 that could have caused the miosis in this case.

9 MR. LI: Your Honor, just on the -- the point  
10 that Mr. Hughes and I -- our various  
11 communications. I'm getting the records relating  
12 to this because we didn't discover that Mr. Hughes  
13 had been -- the date on which Mr. Hughes had been  
14 notified until we received the entire litigation  
15 package from the lab. And that has the notes in it  
16 that explains -- from the tests that explain the  
17 conversations that they had with -- with  
18 Mr. Hughes.

19 I would note that -- and that relates to  
20 Shore and Brown. With respect to Mosley, I don't  
21 think the fact -- the conversation that -- that  
22 Dr. Mosley told the state that it would be a waste  
23 of time and money to do the testing -- and I think  
24 it's even in an email. I don't think that was  
25 disclosed until right around the -- the Haddow

1 motion. So -- so in April -- you know -- a month  
2 after the trial had -- had -- had been -- you  
3 know -- well into progress. That -- that only came  
4 out in the middle of an interview with Dr. Mosley.  
5 So -- and we're going to get the record so that we  
6 can lay it out.

7 Even with Mr. Hughes's recitation of what  
8 he believes the facts are, there was clearly a  
9 delay that went past the opening statement. And I  
10 believe it to be at least a week. And -- and the  
11 problem with this, Your Honor, is that it's a  
12 pattern and -- and it has prejudiced the defense.

13 THE COURT: Mr. Li, I want to know what you  
14 knew when you gave your opening statement that  
15 spanned two -- two days.

16 MR. LI: Yes. I'll be happy --

17 THE COURT: What -- what exactly did you know  
18 about the status of testing for organophosphates  
19 months and months after the fact?

20 MR. LI: I knew that the state had done it and  
21 that they had done it about -- I believe two or  
22 three weeks before -- I'm just -- I'm -- I'm trying  
23 to recollect. But I believe it was -- you know --  
24 a week or so before jury selection, which began on  
25 February 16.

1 I have a draft of my opening statement  
2 that I've been reviewing in preparation for my  
3 closing argument. And it reflects the state of my  
4 knowledge at the time. And I did not introduce  
5 this into the argument. But, essentially, it  
6 was -- it did not include the fact that the tests  
7 were unreliable. What it -- what it said was  
8 something to the effect of -- you know -- here  
9 these folks are testing 17 months after the fact.  
10 If they don't think it's organophosphates, why are  
11 they testing?

12 It wasn't until, I believe, Mr. Hughes  
13 handed over the document, the paper, the letter, on  
14 March 2nd that -- that -- that we were alerted to  
15 this fact that they had been informed.

16 Your Honor --

17 THE COURT: Just stay at the substance,  
18 though. So during your opening you knew that there  
19 had been testing --

20 MR. LI: Correct.

21 THE COURT: -- and it was negative?

22 MR. LI: Yes.

23 THE COURT: Okay. What you didn't know and  
24 what you would have added is that there's an  
25 argument that the testing was, basically,

1 superfluous and wasn't going to serve a purpose  
2 anyway?

3 MR. LI: Yeah. That's part of it. But the  
4 other part of it is that the state knows that. So  
5 it's -- it's two things. It's -- one, it's just  
6 the fact of that the testing is, essentially,  
7 irrelevant. But it's also important that the state  
8 did the test and was informed that it was  
9 irrelevant. That's also relevant to the argument,  
10 Your Honor. And I -- I certainly didn't know  
11 anything about that.

12 THE COURT: So what you had was the belief  
13 they did some testing that could have been done and  
14 just was not in your -- not in your favor, didn't  
15 show it, and you didn't know the limitations of the  
16 test at the time you gave the opening? Is that --  
17 that the situation?

18 MR. LI: I was -- Your Honor, I'm just trying  
19 to reconstruct. I was doing -- personally doing  
20 internet research on this issue and not coming up  
21 with very much. And so my opening -- I'm just  
22 trying to tell the Court what I think the state of  
23 my knowledge is based on looking backwards at the  
24 documents.

25 And I believe that my state of the

1 knowledge is -- what I was going to argue was,  
2 well, that sure doesn't sound like good science.  
3 Okay? But I can't tell this Court that I knew for  
4 a fact that it -- it was irrelevant or that the lab  
5 technicians who tested it would say that it's --  
6 it's irrelevant. That's the point. Or that the  
7 state knew that the lab technicians or doctors who  
8 tested it would tell them that it was irrelevant.

9 MR. HUGHES: Your Honor, if I can make one  
10 final point.

11 Again, the sequence -- the state was not  
12 prepared for this particular argument since it's  
13 not pertaining to the Haddow issue directly, so I  
14 don't have the exact dates. But the defendant's  
15 own expert testified -- Dr. Paul testified that  
16 organophosphates only stay in the blood for a very  
17 short period of time. You have to test within  
18 hours or days, he said. And they don't store well.  
19 That's information he had.

20 Obviously the defense had been talking to  
21 their experts since May of last year. And I don't  
22 know if -- if the defense brought up the subject of  
23 testing or the lack of testing with their expert.  
24 But that's something that their own expert has  
25 testified about. That -- that was his knowledge as

1 regarding organophosphates.

2 MR. LI: Well, Your Honor, actually just for  
3 the sequencing, he got the letter and then he  
4 did -- then he did the research. The problem with  
5 experts -- you know -- if you -- if you have  
6 conversations with them about their various  
7 conclusions, you can -- you create material that  
8 may be harmful to your case. So -- so I would tell  
9 you that we were very careful about how we dealt  
10 with this particular issue. I -- I think the Court  
11 understands.

12 I mean, you just -- it was after we got  
13 this letter that we then give that letter to the --  
14 to the -- to the -- to the expert to have him then  
15 look at that and make a determination based on  
16 that.

17 So -- so his -- I mean, look. The  
18 real -- the real issue, Your Honor, is that their  
19 own lab said that it was unreliable. That's the  
20 point. It's not just the fact of it being  
21 unreliable.

22 And I'm sorry to waste so much of the  
23 Court's time. I just wanted to note that this  
24 is -- this is the record. And this is what  
25 happened. We -- we are getting the notes, and

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1 we'll -- we'll tell the Court exactly what the  
2 timing is. But I'm fairly confident that there was  
3 a significant delay, perhaps even as much as a  
4 week, as Mr. Hughes himself acknowledges.

5 All they had to do was send that letter a  
6 little earlier, and then we would have incorporated  
7 that both with our expert for the opening statement  
8 and for my own opening statement. And it's just a  
9 pattern.

10 THE COURT: Well, I certainly believe in -- I  
11 believe in prompt and full disclosure. I talked  
12 about that way, way back and how important that is.  
13 And then we -- we had the Haddow situation, which  
14 is a problem. It -- it is a problem. And I've  
15 acknowledged that repeatedly.

16 So I'm asking these specific questions in  
17 the context today in the -- the pending Brady  
18 motion because prejudice is something I do have to  
19 look at and consider. And at this time, I am --  
20 I'm denying a Brady motion with regard to the  
21 issues raised today.

22 MR. KELLY: Judge?

23 THE COURT: Yes.

24 MR. KELLY: Again, I'm referring to the  
25 government's brief response to a -- the Rule 20 in

1 it. And it reads, defendant continued to act to  
2 introduce more heat, more water, more steam,  
3 exhorting participants to stay in and ignore their  
4 bodies, signs of impending heat illness. Quote,  
5 you are more than that. You are more than your  
6 body.

7 I understand the state can argue its case  
8 and argue the -- the factual propriety of those  
9 statements. I don't have a problem with that. But  
10 here's the real problem. Then the conclusion.  
11 Thereby, creating more heat, more humidity, which  
12 is fine, and more carbon dioxide.

13 That's where the problem is. Because  
14 it's the Haddow report that says the carbon dioxide  
15 buildup is due to the structure of the sweat lodge.  
16 And -- and -- and Mr. Ray did not construct the  
17 sweat lodge. So he did not create more carbon --  
18 carbon dioxide. As Mr. Hughes said, carbon dioxide  
19 is created by human beings.

20 And so that becomes an intervening cause,  
21 that he did not know that the structure of the  
22 sweat lodge and the location of the rock pit would  
23 create a heat barrier that would artificially  
24 increase -- somehow affect equilibrium and create  
25 areas in the sweat lodge where carbon dioxide was

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1 more con -- concentrated, I believe is what  
2 Mr. Haddow's opinion was.

3 And so how can that -- how can that be an  
4 act attributed to Mr. Ray? If -- if this was going  
5 to be correctly stated, it would have to say, and  
6 knowing the construction of the sweat lodge was  
7 deficient created more carbon dioxide. And there's  
8 been no testimony in this case that Mr. Ray had any  
9 knowledge as to the construction defects in the  
10 sweat lodge.

11 So to allow the State of Arizona to make  
12 that argument in -- in closing, Judge, I -- I  
13 believe is highly improper and violates the  
14 due-process rights of Mr. Ray. And the second  
15 portion of my request is that they be precluded  
16 from making those types of arguments.

17 THE COURT: And I'm -- I'm just trying to keep  
18 track of what's being raised. There was a Brady  
19 motion raised with regard to Dawn Sy. And I think  
20 it was tied in to an argument that there's a  
21 pattern. And I'm making clear that I'm denying  
22 that.

23 There's a separate issue about what  
24 appropriate argument might be in light of the  
25 Haddow Brady violation.

1 And Mr. Hughes, I think you wanted to  
2 address that.

3 MR. HUGHES: If I can, Your Honor.

4 Certainly the Haddow report and the  
5 conclusions in it is before the Court. The Court  
6 has allowed the defense to call Mr. Haddow or to  
7 bring in their own air quality expert. In response  
8 to that, the defense expressed some real  
9 reservations about the accuracy or the quality of  
10 Mr. Haddow's work.

11 Yesterday when Dr. Paul was on the stand,  
12 Ms. Do elicited in her test -- in her questioning  
13 of Dr. Paul the opinion, which is the only  
14 testimony that's in evidence so far -- and the jury  
15 can accept it or reject it. And I'm sure Ms. Do  
16 would not have elicited it if she didn't believe it  
17 was true -- Dr. Paul's opinion that carbon dioxide  
18 would be equally disbursed throughout the sweat  
19 lodge.

20 That indicates to me that consistent with  
21 the pleadings that the state -- or that the defense  
22 filed that they question Haddow's quality of his  
23 qualifications and the quality of his report. They  
24 no longer believe that there is a particular area  
25 in the sweat lodge, even though the testimony of

1 the lay witnesses is there are areas where there  
2 was no fresh air coming in.

3 So the defense's own expert was saying  
4 the carbon dioxide would be equally disbursed. I  
5 think that's something the jury can accept or  
6 reject. Certainly the state can't bolster an  
7 argument to the jury and argue to the jury, well,  
8 you shouldn't believe Dr. Paul that there's --  
9 there's Haddow report.

10 The jury is never going to know about the  
11 Haddow report. What the jury has is expert  
12 testimony from the defense expert. And the jury  
13 can accept that or reject that depending on how  
14 they believe that testimony fits with the testimony  
15 of the lay witnesses who said, we were in this area  
16 and we didn't feel any fresh air. We were in this  
17 area and we didn't feel any cool air when the flap  
18 was opened.

19 So, again, the state is not arguing the  
20 ability to use the Haddow memorandum. The Court's  
21 been very clear that we can't use that, and the  
22 state's not going to. The testimony, though, that  
23 should be allowed to be -- the jury should be  
24 allowed to hear about in closing arguments is  
25 testimony that came in in this trial from

1 particular people who said we were in an area where  
2 there wasn't cool air.

3 The testimony and the conclusions from  
4 the medical records that here you are in a back  
5 area and you have this cluster of people in this  
6 area who are becoming seriously ill, the only  
7 people in that back area who didn't become  
8 seriously ill were the ones who were where Mr. Rock  
9 was when he opened that flap twice.

10 So it's a legitimate argument based on  
11 the testimony in the case, not upon this Haddow  
12 memo.

13 THE COURT: Mr. Hughes, you indicate that  
14 you're -- you're not arguing the Haddow report.  
15 But I recall examination of a lay witness where a  
16 lay witness was asked about pooling of carbon  
17 dioxide or something of that -- of that nature and  
18 getting into the structure. I remember that  
19 questioning.

20 MR. KELLY: Judge, and you're absolutely  
21 correct. It was the redirect by Ms. Polk. It was  
22 a specific question. It was leading. It was  
23 objected to. And a motion to mistry the case was  
24 premised on it. That was denied.

25 MR. LI: Sorry, Judge. I think we're having a

1 slight miscommunication. There's two issues here.  
2 One is Ms. Polk with Detective Diskin on the stand,  
3 asked him, what were you -- what were you looking  
4 at, something like that. And he said something to  
5 the effect of carbon dioxide. And I don't remember  
6 the rest of it, but we quoted it off -- straight  
7 off the record.

8 And then Ms. Polk asked, was that  
9 consistent with information you learned from a man  
10 named Rick Haddow? Okay? So that was one of the  
11 issues where it was an intentional introduction of  
12 Mr. Haddow and his conclusions through the  
13 detective to this jury.

14 So it's incorrect that the state has  
15 never, ever introduced the idea of Mr. Haddow or  
16 any of his reports in front of jury. This was --  
17 this was even after we had filed the Brady motion.

18 THE COURT: Mr. Kelly, I think that's where  
19 the motion for mistrial came. The other witness I  
20 don't think there's a motion for mistrial. There  
21 was an objection.

22 MR. KELLY: I agree, Judge. And -- and so,  
23 again, in regards to closing argument, again, I'd  
24 refer to the brief. The brief writes, defendant  
25 continued to act, causing more carbon dioxide.

1 That would be highly improper to suggest to this  
2 jury that Mr. Ray was the one that created the  
3 carbon dioxide that killed these people.

4 And then later on in the brief it's  
5 emphasized by Ms. Polk, the evidence shows the air  
6 inside the sweat lodge was compromised due to  
7 carbon dioxide and lack of circulation, which is  
8 exactly the Haddow report.

9 So now we have a Brady violation found by  
10 the Court, an inculpatory aspect of that report,  
11 and an exculpatory, the state improperly asking  
12 questions about the inculpatory aspect. And now  
13 apparently -- they have to identify the act to --  
14 to support a manslaughter charge.

15 And our concern is -- because obviously  
16 we haven't listened to the closing argument, our  
17 concern is that this type of an argument is going  
18 to be advanced, not that explained by Mr. Hughes.  
19 You know, obviously there's been testimony we  
20 weren't getting cool air in the back, et cetera.  
21 We're not objecting to that.

22 We're objecting to this statement that it  
23 is Mr. Ray who continued to act to create more  
24 carbon dioxide, that it was he who was responsible  
25 for compromising the air quality due to carbon

1 dioxide and lack of circulation. That's simply not  
2 the evidence in the case and highly misleading.  
3 And in this brief, and Ms. Polk's argument on the  
4 Rule 20, was replete with misrepresentations of  
5 fact.

6 And I'll give you another one, which is a  
7 different issue, Judge, but needs to be discussed.  
8 She writes, all of the state's medical experts  
9 testified to a medical degree of certainty that the  
10 three victims died as a result of exposure to heat.  
11 That is simply not true. There is not an expert  
12 witness in this case that testified to a reasonable  
13 degree of medical certainty. They provided  
14 opinions right and left. And Dr. Lyon said, my  
15 opinion is 51 percent correct.

16 But no one went through -- on both sides.  
17 Dr. Paul didn't do it. No one went through the  
18 classic questioning of an expert witness that,  
19 then, based on your education, training, and  
20 experience and review of the materials provided, do  
21 you have an opinion to a reasonable degree of  
22 medical certainty? Yes, I do. What is that  
23 opinion?

24 There wasn't an expert in this case that  
25 testified in that fashion, and yet that's what's in

1 this brief. And our fear is that those types of  
2 misrepresentations are going to cause Mr. Li again  
3 to have to stand up in front of the jury and object  
4 during closing arguments. So we'd like to -- to  
5 discuss it today.

6 And I didn't mean to get off track. I  
7 just used that because when I read this brief --  
8 and I -- I believe during the oral arguments you  
9 identified three areas of concern, one of which was  
10 remedied by supplemental pleading -- pleading by  
11 the state. And the other two were distinct  
12 concerns about a misrepresentation of fact.

13 It all relates to due process because the  
14 government is not just free to recklessly stand up  
15 and argue what it wants to in a closing argument.  
16 We have filed in this case a prosecutorial  
17 misconduct motion outlining the standards. A  
18 prosecutor cannot vouch. It cannot intentional  
19 misstate facts.

20 It can take facts, which were developed  
21 during trial and make arguments as they relate to  
22 the elements of the crime, but it can't misstate  
23 the facts. It can't make conclusory remarks, such  
24 as everyone testified to a medical degree of  
25 certainty, when that did not happen.

1 It cannot, Judge, after the finding of a  
2 Brady violation by this Court, then turn that  
3 around and say Mr. Ray is responsible for deaths  
4 because the area was compromised due to carbon  
5 dioxide and lack of circulation when the evidence  
6 in the case is that he had nothing to do with the  
7 construction of the sweat lodge.

8 I think the request today is to caution  
9 the State of Arizona to make its arguments based on  
10 the facts and in compliance with Arizona law and  
11 standards applicable to prosecutors. And -- and  
12 when I looked at this motion, this is not in  
13 compliance with those standards.

14 THE COURT: You referred to page 6 before,  
15 Mr. Kelly. What other pages have you been looking  
16 at?

17 MR. KELLY: Judge, I randomly --

18 THE COURT: Okay.

19 MR. KELLY: -- referred -- I randomly opened  
20 to page 6. The pleading as it relates to the facts  
21 is more -- I can turn back to page 5.

22 THE COURT: I want Mr. Hughes to be able to  
23 know where the references are.

24 MR. KELLY: Okay. On page 5, defendant  
25 intentionally induced heat stroke. Defendant knew

1 and intended the victims would experience physical  
2 effects and mental status change from the heat.  
3 Defendant intentionally used heat and humidity to  
4 create altered mental status of his participants.  
5 Then -- then the citation. All references are to  
6 our notes and not -- not the trial transcript.

7 If we go to page 7, Mark Rock and Dawn  
8 Gordon, both of whom had access to outside air  
9 every time. My recollection is Dawn Gordon said, I  
10 didn't know the tent was open.

11 Sean Ronan, Tess Wong, to the right, fell  
12 unconscious, a medical -- a medical diagnosis that  
13 the state is going to use. Witnesses testified --  
14 and this is page 7 -- that his event was a gross  
15 deviation from the conduct of other sweat lodge  
16 facilities -- facilitators.

17 Judge, it goes on and on and on. He  
18 continued his ceremony in spite of obvious distress  
19 of the participants. Now, if -- if that type of  
20 argument takes place, Judge, I would submit that  
21 it's an automatic mistrial and -- and they'll be  
22 briefing whether or not the government can refile  
23 this case because those types of statements in a  
24 closing argument are flat wrong.

25 What the government can do is take the

1 facts of the case, as you well know, Judge, and  
2 argue how the facts relate to the elements of the  
3 alleged crimes. But to make these conclusionary,  
4 inflammatory remarks which mislead the jury and  
5 misrepresent the facts is wrong. And -- and that's  
6 our concern.

7 So if I -- I don't know if I answered  
8 your question or not. But as I went through this  
9 there's repeated misstatements of fact.

10 THE COURT: Mr. Hughes.

11 MR. HUGHES: Thank you.

12 Your Honor, I'll try and address these in  
13 the order that Mr. Kelly raised them.

14 With respect to the original issue that  
15 we've argued as far as the arguments -- closing  
16 arguments by the state regarding the carbon dioxide  
17 and Mr. Ray's role with the carbon dioxide, it is  
18 appropriate for the state to argue Mr. Ray's role  
19 based on the testimony and the evidence that's come  
20 in to date. And I've -- I've already recounted  
21 that earlier this morning.

22 And this argument, it is the appropriate  
23 argument for the state to make, particularly  
24 because, unlike as Mr. Kelly says, the state is not  
25 required to show an act if we can show the duty and

1 an omission for that duty. And the -- certainly  
2 the state believes that Mr. Ray is responsible and  
3 that the -- there is sufficient evidence for a jury  
4 to find Mr. Ray guilty beyond a reasonable doubt  
5 for his conduct.

6 But there is also evidence to show that  
7 he's responsible for an omission to act once that  
8 duty gave rise. And we discussed that in some of  
9 the different pleadings that we filed, both  
10 regarding the duty for the creation of peril and  
11 that -- and we will be arguing for a  
12 contract-related duty as well with respect to the  
13 jury instructions.

14 So with respect to an omission to act,  
15 with respect to a duty, the state would disagree  
16 that the state is limited in conduct when there is  
17 a duty.

18 With respect to the other statements that  
19 are in the pleading, Dr. Dickson testified about  
20 what doctors use in -- in making a determination.  
21 If you recall, Ms. Do was trying to pin the doctor  
22 down about what did this doctor say and he can't  
23 exclude and what did that doctor say and that  
24 doctor can't exclude.

25 Dr. Dickson explained that no doctor

1 anywhere is ever going to say can I exclude  
2 something with absolute certainty? And Dr. Dickson  
3 explained that that is not what reasonable doctors  
4 do. They can never say I can't exclude this with  
5 absolute certainty. This is possible or that is  
6 possible.

7 That's what Dr. Dickson conveyed to the  
8 jury in his testimony when he was confronted by  
9 Ms. Do about differing opinions that Ms. Do  
10 purported to represent.

11 With respect to the other items that  
12 Mr. Kelly has argued about, for example, the  
13 statement intended -- defendant intentionally  
14 induced heat stroke to take participants to the  
15 edge of death to show them the altered experience  
16 of near death. That's fair comment on the  
17 evidence.

18 The juror -- the jury has heard both this  
19 presweat lodge briefing that Mr. Ray has given.  
20 They've heard the participants talk about Mr. Ray's  
21 encouragement that they should be having an altered  
22 state. The jury has heard testimony from the  
23 medical doctors that the altered mental state is  
24 the textbook, hallmark criteria of one of the two,  
25 with the temperature being the other one, of heat

1 stroke.

2 Fair comment to show that Mr. Ray was  
3 trying to get people to that altered mental state,  
4 to that state of heat stroke, to give them the  
5 altered mental state that they had paid so much  
6 money to have.

7 With respect to some of the other --

8 THE COURT: Mr. Hughes, I think I -- I have to  
9 stop you right there. All through this -- and --  
10 you know -- I've avoided making any comment on the  
11 evidence absolutely in front of the -- the jury.  
12 But because of -- of the nature of this case and --  
13 and the 404(b) motion where it started out, I  
14 just -- I just note this.

15 The state repeatedly makes no distinction  
16 between heat exhaustion and heat stroke. And I  
17 think every one of these doctors have made a major  
18 distinction, major distinction.

19 Well, I don't want to go any further.  
20 But go ahead. Go ahead.

21 MR. HUGHES: And if I can address that,  
22 Your Honor.

23 The testimony that -- that has come from  
24 Dr. Dickson and the other doctors is there is a  
25 continuum. But the point where you reach heat

1 stroke is the point where you have core body  
2 temperature of above 105 degrees and where you have  
3 an altered mental status. Those are the two  
4 textbook criteria. Dr. Dickson testified to that  
5 and other doctors testified to that.

6 Before you reach that point, there is  
7 heat exhaustion. Before that you have, I think,  
8 prickly heat and other things that other doctors  
9 have testified about on that continuum.

10 But the core criteria for heat stroke are  
11 the temperature of the body. And Dr. Dickson and,  
12 I believe, even Dr. Paul explained that that is not  
13 necessarily a useful diagnostic criteria if you're  
14 unable to get a core criteria after the fact. You  
15 then have to look at the circumstances.

16 Dr. Paul believes that dehydration is  
17 another core diagnostic criteria. When we -- there  
18 has been some testimony in contradiction between  
19 the experts. But even Dr. Paul agrees that the  
20 altered mental state is one of the textbook  
21 hallmarks for heat stroke.

22 And it's the state's theory that the  
23 defendant is trying to put these people into an  
24 altered mental state through the use of heat in the  
25 sweat lodge. It's not through the use of chanting.

1 It's not through the use of anything else. It's  
2 the application of heat, particularly humid heat,  
3 to the victims over a prolonged period of time.  
4 And those are the exact factors that Dr. Dickson  
5 testified caused heat stroke in this case.

6 And if I'm -- if I'm missing the Court's  
7 concern, I apologize. I -- I don't know exactly  
8 what -- what the Court's concern is regarding the  
9 testimony of heat exhaustion versus heat stroke. I  
10 believe there's been testimony presented that would  
11 allow the jury to conclude that the three victims  
12 that died in this case suffered from heat stroke.

13 I also believe that there's been  
14 testimony that would allow the jury to conclude  
15 that the other persons, particularly the ones in  
16 that shaded area on the defense exhibit that was  
17 admitted and blown up, were also suffering from  
18 heat stroke.

19 And so yes. There is heat exhaustion.  
20 But when you move from heat exhaustion to the  
21 altered mental status, which you have at heat  
22 stroke, that's the move that we believe the  
23 defendant was trying to induce.

24 Did he know that that was technically  
25 called "heat stroke" or not? That's something for

1 a jury to try and determine. But the -- the  
2 symptom, the core diagnostic symptom, of heat  
3 stroke when you can't get the rectal temperature,  
4 the one you're left with is the altered mental  
5 status.

6 And that's what the state believes  
7 Mr. Ray was intentionally trying to do, although in  
8 this case, intent is not a necessary element,  
9 although it can be used in trying to determine if  
10 he was reckless in his conduct.

11 With respect to the other arguments that  
12 Mr. Ray -- or Mr. Kelly raised, including the  
13 argument that Mark Rock and John (sic) Gordon, both  
14 of whom had access to outside air every time -- and  
15 I'm quoting from the state's Rule 20 motion --  
16 that, again, is a fair comment on the testimony.

17 Ms. Gordon testified that she was not  
18 aware about the flap opening or closing right next  
19 to her. However, she also testified as to her  
20 state during the proceedings and what was going on.

21 Mark Rock testified he was directly next  
22 to her and was opening the flap in the area between  
23 where she was and he was and that he could feel  
24 some relief when he did that. That testimony is  
25 fair comment, then, to say that both he and



1 Ms. Gordon had access to air -- outside air every  
2 time Mr. Rock lifted the flap.

3 Mr. Kelly objected, I believe, to the  
4 statement, everyone else in the immediate area --  
5 Kirby Brown, James Shore, Sidney Spencer to the  
6 left, Sean Ronan and Tess Wong to the right -- fell  
7 unconscious. Again, "unconscious" is a term that  
8 fairly describes the testimony that we've had of  
9 people who were being dragged out and were not  
10 alert as to what was going on. And that testimony  
11 is fair comment.

12 It does not take a medical doctor -- and  
13 I don't think it would be appropriate to limit the  
14 state from using the word "unconscious" when we  
15 have testimony about people who are having their  
16 eyes rolled back, they're unresponsive in any other  
17 way. To call that "unconscious" when you're  
18 arguing to the jury about the set of facts is  
19 appropriate comment.

20 I understand during the trial there is  
21 limitations on witnesses using that term,  
22 particularly if they didn't have a medical  
23 background.

24 And then witnesses at trial testified the  
25 defendant's conduct at this event was a gross

1 deviation from the conduct of other sweat lodge  
2 facilitators. That also is fair comment. We've  
3 had testimony from Fawn Foster. We've had  
4 testimony from a number of the participants who  
5 have been other sweat lodge facilitators and how  
6 they run their sweat lodges, the problems that they  
7 did not have, and -- and the reasons in those  
8 witnesses' opinion they didn't. They had less  
9 participants. Sometimes they would leave the flap  
10 open in the middle of round, things along those  
11 lines. The heat was not nearly as intense within.

12 And I -- the last one that I noted that  
13 Mr. Kelly brought up was that he continued his  
14 ceremony in spite of the obvious distress of the  
15 participants. Your Honor, again, that's fair  
16 comment. There's been testimony that unconscious  
17 persons were dragged out in front of Mr. Ray.  
18 There's been testimony that someone was screaming  
19 about possibly dying and having a heart attack  
20 outside in the near vicinity of where Mr. Ray was.

21 There's testimony about the statements  
22 that people made within the sweat lodge about  
23 persons who were in distress or who had been passed  
24 out. The statement, then, that Mr. Kelly objects  
25 to is fair comment based on the evidence.

1 THE COURT: There's several cases that are  
2 styled. State versus Bible. But it's one of  
3 the -- one of those, State versus Bible, that  
4 really discusses the scope of proper closing  
5 argument, arguing reasonable inferences from the  
6 evidence. That's the guideline. And I don't have  
7 the cite handy.

8 Intentionally -- what was the phrase  
9 again?

10 MR. KELLY: Judge, if I may. The phrase in  
11 the pleading was intentionally induced heat stroke,  
12 which many doctors said is a medical condition  
13 that's irreversible.

14 And then later on Mr. Hughes said, it's  
15 our understanding of the facts that the defendant  
16 intentionally tried to induce an altered state  
17 through the use of heat. That's second argument by  
18 our prosecutor, Judge -- and if I were a Judge, I  
19 would submit is okay. That is an interpretation of  
20 the evidence. But to say that my client  
21 intentionally induced the medical state of heat  
22 stroke, which is irreversible, is improper  
23 inference.

24 Now, I believe -- and I -- I believe  
25 we'll -- we'll have a brief for the Court by Monday

1 identifying with a greater specificity to the  
2 objectionable comments. But the real problem is,  
3 and what we're trying to identify, a concern that  
4 we have in this case. The real problem, Judge, is  
5 that we do not want to object to Ms. Polk's closing  
6 argument in front of the jury.

7 And -- and if there's a statement that  
8 says Mr. Ray intentionally induced heat stroke,  
9 that's going to require an objection. And -- and I  
10 believe Mr. Hughes' response to my concern is  
11 simply --

12 And I'm paraphrasing, Bill.

13 But we're going to do it anyway. And  
14 that's why the concern is this.

15 I haven't heard -- I understand -- I  
16 understand what Arizona law is. I understand the  
17 limitations set forth by Bible. I understand the  
18 due-process rights of the citizen of the  
19 United States, and we're going to do the best we  
20 can to comply with the law. It's every time. It's  
21 from the written voir dire questions where somebody  
22 said, I cannot be fair, through today that the  
23 government has pushed to the fringe of the  
24 admissibility of evidence. They have pushed this  
25 man's due-process rights to the edge of the

1 precipice.

2 And -- and, thus, we have the concern,  
3 Judge. And every time that we're forced to object  
4 in front of this jury it creates a concern on  
5 Mr. Li's and I part as to whether or not we can  
6 adequately represent Mr. Ray.

7 So I agree with you, Judge. Bible sets  
8 forth the standard. We filed a brief. We'll file  
9 another brief. What we're asking is an admonition  
10 from the Court to encourage the prosecutor to  
11 comply with Arizona law as to what permissible  
12 inferences can be drawn from the evidence. And if  
13 that's violated, this case ought to be mistried.

14 That's our position, Judge. And thank  
15 you for the opportunity to put it on the record.

16 MR. LI: And, Your Honor, I'm sorry. Just --  
17 I had -- we have pulled the -- the phone log from  
18 the communications with the lab. And if I can --  
19 it's Bates No. 8204 for the state's purpose. And  
20 I'd like to bring this to the Court if I could.

21 MR. HUGHES: May I see it?

22 MR. LI: Yeah. Sure. Of course.

23 This is from the litigation package that  
24 was produced to the defense, I believe, on  
25 April 6th or sometime thereabouts.

1 And, Your Honor, there's the  
2 communication notes from the NMS labs. And it  
3 contains the -- the communications that were had  
4 with Kathy Durrer and also with Mr. Hughes and sets  
5 out the dates.

6 MR. HUGHES: And, Your Honor, if I could  
7 respond to Mr. Kelly's final point.

8 Intent, which is a mental state, the case  
9 law is very clear. It is something that's inferred  
10 by the circumstances, can be inferred from a  
11 defendant's statement, such as his -- in this case,  
12 the briefing that he gave to the participants, and  
13 it can be inferred by the circumstances.

14 And it is appropriate argument to ask the  
15 jury to infer intent in this case based upon what  
16 the defendant told the participants he was going to  
17 do and what the defendant told the participants he  
18 was going to try to achieve for those participants,  
19 cause to happen in them, and in the medical  
20 testimony that explains the medical significance of  
21 what that change is.

22 MR. KELLY: Judge, just so I'm -- that would  
23 be a poor business model to have the president of a  
24 corporation intend to cause death of the  
25 participants and a tough time getting future

1 participants. But that's, essentially, this -- the  
2 highly prejudicial position the state wants to  
3 take, that he intentionally induced heat stroke.

4 MR. LI: And, Your Honor, I think the -- the  
5 real issue here is -- is the medical issue that the  
6 Court has identified, which is that there is a  
7 substantial difference between an altered mental  
8 status changes that take place with heat  
9 exhaustion, which doctor -- all of the doctors  
10 testified, could include syncope, and coma. Those  
11 are big differences.

12 And -- and I think the -- the -- the sort  
13 of smushing together of the idea that Mr. Ray says  
14 you'll have an altered state -- you know -- he also  
15 says lucid in that same statement. Lucid is  
16 inconsistent with unconscious.

17 Altered state, we've had plenty of  
18 testimony, includes meditation and what have you.  
19 But this sort of conflating altered state into coma  
20 is -- is the problem here, Your Honor. It's  
21 contrary to the medical evidence.

22 It's actually contrary to what the --  
23 what the actual tape says. And -- and -- and the  
24 point that Mr. Kelly is making, I believe, is that  
25 it's -- it's -- it's -- it's not fair commentary

1 about the evidence and it's not consistent with the  
2 prosecutors' obligations under Arizona law and the  
3 Professional Code of Ethics.

4 THE COURT: One thing I can rule on is this,  
5 is that there -- there can be no use of the Haddow  
6 report for any inculpatory inference or argument.  
7 Because that's the -- the other aspect of that,  
8 Mr. Hughes and Ms. Polk, is to the extent there are  
9 inculpatory aspects to that, it -- it was late  
10 disclosed there during trial. So if there are  
11 inculpatory aspects to it, you got to avoid it.  
12 That's something that's left out of this trial. So  
13 I'll say that.

14 With regard to argument and arguing of  
15 something like somebody intentionally induced heat  
16 stroke, which is a life-threatening condition  
17 arguably, arguably something that many people would  
18 not recover from, to say there's a basis for that,  
19 look at Bible. Maybe there is. Maybe there is.  
20 Maybe that's something that's within -- within  
21 argument.

22 The defense just recently raised a point,  
23 though. There's an obligation to make arguments  
24 only that are really substantiated from the  
25 evidence. And -- and the state has that

1 obligation, I'm sure is strongly aware of that.  
 2 Because you know that the overall duty in a  
 3 prosecution and what the real goal of a prosecution  
 4 is -- I know you understand that.

5 I'm recalling the argument about it  
 6 didn't make any difference really, Detective Diskin  
 7 in making the PowerPoint and said heat stroke,  
 8 there's been diagnosis -- diagnosis of heat stroke  
 9 when it -- it appeared to be a heat exhaustion  
 10 diagnosis.

11 But Mr. Hughes or Ms. Polk, I think it  
 12 was argued as if that didn't make any difference in  
 13 making that representation. But I think every one  
 14 of the doctors here makes a major distinction  
 15 between those two terms. So I'll just say that.  
 16 Maybe it is arguable. Maybe that's something  
 17 that's within proper argument.

18 So Bible will be the goal.

19 MS. POLK: Your Honor, if I can ask for a  
 20 clarification. I understand -- and the state never  
 21 has intended to use the Haddow report in any  
 22 fashion. Mr. Hughes laid out for the Court  
 23 testimony from other witnesses, particularly  
 24 Dr. Mosley's testimony, where he said that crowd  
 25 that many people in, that carbon dioxide would --

1 would build up and he would expect that there'd be  
 2 no air flow.

3 Is the Court allowing us to use testimony  
 4 that was admitted at trial that is evidence to  
 5 argue reasonable inferences?

6 THE COURT: Of course.

7 MS. POLK: Thank you.

8 MR. LI: Your Honor, just a correction of the  
 9 record. It is not the case that the state has  
 10 never used the Haddow report in trial. Ms. Polk  
 11 herself asked the very question that I identified  
 12 for the record.

13 Here it is. Mr. Kelly -- this is  
 14 Detective Diskin here: Did I believe that the  
 15 deaths were a result of the combination of heat and  
 16 carbon dioxide?

17 Question from Ms. Polk: Is that  
 18 consistent with the information that you learned  
 19 from the man named Rick Haddow?

20 Answer: Yes.

21 So it is -- it is factually incorrect the  
 22 state has never done that. And I'm trying to  
 23 understand what the Court's ruling is again on  
 24 this. It seems to us that this idea of all of the  
 25 things that Mr. Kelly was identifying in the brief

1 about the -- the construction of the lodge and that  
 2 the circulation of the air, all of those sorts of  
 3 things, are encompassed by the Haddow report.

4 They have actually -- they have a  
 5 resonance because this is what Ms. Polk asks. She  
 6 asks her own detective about the Haddow report.  
 7 And that's the problem. So they -- they violate  
 8 Brady. And this is after our briefing. This is  
 9 after the -- the Brady violation.

10 THE COURT: And, Mr. Li, I also discussed  
 11 the -- another instance where I recall a lay  
 12 witness being asked, basically, to -- to  
 13 substantiate what's in the Haddow report. We've --  
 14 we've covered that.

15 MR. LI: Dawn Sy. Dawn Sy was the --

16 THE COURT: Dawn Sy --

17 MR. LI: -- no. Dawn Gordon.

18 THE COURT: It was a lay witness.

19 MR. LI: Dawn Gordon was the witness. And so  
 20 it just seems to me --

21 THE COURT: I think it was before that  
 22 actually that I recall something before that where  
 23 there was testimony of a witness about pooling of  
 24 CO2 or --

25 MR. LI: There was. But I also remember --

1 Dawn Gordon was my witness, and I remember her  
 2 being asked those same questions.

3 The point is that they commit a Brady  
 4 violation. They emphasize the Brady violation with  
 5 this intentional questioning, which it just is  
 6 intentional. And then they want to argue the exact  
 7 same facts that are in the -- in the Brady  
 8 violation without any of the exculpatory facts.  
 9 That's the problem that we're identifying.

10 So I -- I still don't know exactly  
 11 what -- what the state is permitted to argue and  
 12 what it's not permitted vis-a-vis the Haddow  
 13 report, CO2, construction of the lodge, all of  
 14 those things.

15 THE COURT: And, Ms. Polk, I wanted to state  
 16 it was discussed in sidebar and referenced by  
 17 Mr. Kelly here. But there was a transcript  
 18 provided in the third instance. And I indicated  
 19 that -- I used the words "seemed" or something.  
 20 Still I indicated I thought it wasn't accurate  
 21 concerning Dr. Dickson's testimony in listing of  
 22 medical advice concerns.

23 It turned out to be accurate, in my  
 24 opinion. Slight differences in language, but the  
 25 substance was, essentially, accurate. And I

1 wanted -- wanted to make that clear. So I'm -- I'm  
2 thinking back through a lot of evidence over a lot  
3 of time and recalling what I can.

4 But I think it's appropriate to address.  
5 Mr. Li wants more guidance. And my problem is I --  
6 I'm looking at the Bible case. These are officers  
7 of the Court, both sides. You need to make  
8 arguments based on that evidence, not anything  
9 else.

10 MR. LI: Your Honor, and I neglected to  
11 mention the part of that hearing that you circled  
12 for me is that there's -- at the very top you were  
13 asked some questions. There's a whole colloquy  
14 about Rick Haddow, about that he's an air quality  
15 expert and all of those sorts of things. And then  
16 Detective Diskin, they go into that quality -- the  
17 discussion about carbon dioxide and heat and is  
18 that information consistent with the -- that you  
19 learned from the man named Rick Haddow? Yes.

20 I mean, that's -- that's the problem is  
21 that they've already bolstered whatever they're  
22 going to argue. It's not a lay person's opinion,  
23 oh, everybody knows there's carbon dioxide.  
24 They've already bolstered all of this testimony  
25 through Detective Diskin intentionally referencing

1 the air quality expert named Rick -- Rick Haddow,  
2 purposefully.

3 So that's the problem we're having here  
4 is that this -- this -- this information was  
5 purposefully elicited by Ms. Polk, the county  
6 attorney, after the Brady violation was found. And  
7 then -- then they're going to argue the same thing,  
8 but -- but somehow that's just based on common  
9 sense and we can ignore page 187 of a transcript.

10 THE COURT: And I -- I do want pertinent  
11 portions of transcripts at some point.

12 Ms. Polk, if you'll address that. And we  
13 do need to take a break.

14 MS. POLK: Well, Your Honor, in interest of  
15 completeness, I would ask that the Court look at  
16 the -- what preceded those questions. Perhaps the  
17 Court recalls. Perhaps not. But when Mr. Kelly  
18 cross-examined Detective Diskin, Mr. Kelly went  
19 through the entire Haddow situation for the jury,  
20 including dates when the state got the report, the  
21 date that we noticed Rick Haddow as a witness, the  
22 date that we withdrew Rick -- Rick Haddow as a  
23 witness. This is through the examination of  
24 Detective Diskin.

25 And then in front of the jury said, and

1 isn't it true that the Court sanctioned the state  
2 for this violation? And I believe -- I'm not  
3 positive as I stand here. But I believe that  
4 Mr. Kelly also said to the jury, and that five-day  
5 delay, the delay we had, was because of the state.

6 And then I -- and then he also through  
7 that line of questioning was suggesting that the  
8 information that was in the Haddow report, that  
9 none of that information was provided by the  
10 detectives to -- or by the state to the defense.

11 My redirect then was to correct that  
12 misinformation. And I had direct -- I had  
13 specifically directed Detective Diskin to the  
14 portion of his interview where he had told the  
15 defense that carbon dioxide was -- that he knew  
16 that carbon dioxide was at play. And secondly,  
17 that at the hearing, which was the grand jury  
18 hearing, that he had testified about the air  
19 quality specialist. And that was the reference  
20 there.

21 So my redirect was to clear up this  
22 misinformation given to the jury by Mr. Kelly. And  
23 including, frankly, completely inappropriately  
24 saying to the jury that the state had been  
25 sanctioned and I believe that there had been that

1 delay.

2 And so if you take my line of  
3 questioning, put it in the appropriate context  
4 rather than pull out one sheet, then I think the  
5 Court can see that my redirect was appropriate to  
6 establish the point I was establishing, which was  
7 that Detective Diskin had told the defense that  
8 there was this -- there was this information  
9 concerning carbon dioxide.

10 On another issue that the Court a couple  
11 times has said there's another witness who has  
12 talked about carbon dioxide, I believe it could be  
13 Scott Barratt. I'm -- I'm looking through my notes  
14 and I don't see it. But --

15 THE COURT: I remember him talking about it in  
16 the interview. I don't remember him saying  
17 anything on the stand.

18 MS. POLK: And that's what I can't remember.

19 THE COURT: It was a -- a female witness  
20 who -- who I recall questions about whether there  
21 was pooling of CO2 or something that was technical  
22 that went beyond what Mr. Kelly was referring to.  
23 People know you breath in oxygen and out goes CO2.  
24 I mean, it --

25 MS. POLK: Perhaps it's perhaps one of the

1 female doctors, now that the Court --

2 THE COURT: I don't think it was a doctor.

3 But in any event, I -- I just recall that  
4 the -- the -- there was a lengthy bench discussion  
5 and probably in open court as well in that -- in  
6 that context regarding the motion for mistrial that  
7 was denied before.

8 And we are going to go ahead and take the  
9 recess now. 15 minutes. Thank you.

10 (Recess.)

11 THE COURT: The record will show the presence  
12 of Mr. Ray and the attorneys.

13 MR. KELLY: Judge, may I just make a brief  
14 comment? And that is during my cross-examination  
15 of Mr. Diskin -- Detective Diskin. I did not  
16 misrepresent anything. I did not present  
17 misinformation to the jury.

18 I agree with the recollection of Ms. Polk  
19 as to the content of my cross-examination. That  
20 pretty much sums up what I did. It was factually  
21 true. My recollection is we had an agreement  
22 before the cross-examination as to the scope of the  
23 cross. I did not misrepresent anything.

24 Importantly, though, in -- in this vein,  
25 there was no substance or content allowed during

1 cross-examination as to the exculpatory portion of  
2 Mr. Haddow's report. So there is no door opened  
3 on -- on redirect to the statement read by Mr. Li.

4 THE COURT: When you say "allowed," I think it  
5 was by choice. I made very clear that the  
6 defense -- defense could use the report in whatever  
7 fashion and all that. So I don't agree with the  
8 term "not allowed." I think it was -- it was a  
9 decision in order to avoid opening up a door --

10 MR. KELLY: Correct.

11 THE COURT: -- in that -- in that sense.

12 I don't know how much more guidance I can  
13 give, Mr. Kelly. That was the issue before the  
14 Court.

15 Ms. Polk, I don't know if you were quite  
16 finished addressing the Court. Since we were  
17 running over the 90 minutes, I wanted to take a  
18 break. But I think I've given the -- the guidance  
19 I can.

20 MS. POLK: I -- I believe you have, Judge.

21 THE COURT: And -- okay. Is there -- other  
22 than instructions, any other legal issue?

23 MR. KELLY: Judge, we do, I think, have two  
24 additional areas. If I can go back to my notes.  
25 One is just in terms of scheduling. We'd -- we'd

1 like to know whether the state intends to call any  
2 rebuttal witnesses.

3 And the reason we're making that request  
4 is because we believe rebuttal evidence is quite  
5 restricted under Arizona law. We have a bench  
6 memorandum in that regard. We don't -- you can  
7 only, in our opinion, rebut new facts brought out  
8 by either Ms. Sy or Dr. Paul. And, thus, that  
9 would be a question we have for the State of  
10 Arizona.

11 And the reason that, of course, is  
12 important is because we do have some other jury  
13 instructions issues that are going to be needed --  
14 need to be discussed with the Court. We have our  
15 proposed jury instructions, which, I believe,  
16 Ms. Seifter has now finalized.

17 And so our first question would be  
18 whether or not there's going to be any rebuttal  
19 witnesses.

20 THE COURT: Ms. Polk?

21 MS. POLK: Your Honor, the state is still  
22 making that determination. Obviously what's still  
23 pending is the Court's decision on the three  
24 additional clips that the defense has moved to  
25 admit. If those are admitted, we would bring

1 Detective Diskin back to the stand to explain the  
2 context and how those -- I mean, you understand the  
3 issue, the issue we argued yesterday and the  
4 direction of the investigation.

5 So we, not knowing the Court's ruling on  
6 that, though -- and counsel reminds me that Ted  
7 Mercer also, then, would be called to explain the  
8 context.

9 And then, Judge, the other issue that the  
10 state has, we believe that the Court has already  
11 ruled that counsel cannot use the transcripts in  
12 any way that gives them an extra aura or  
13 reliability. And it came up in the area of -- of  
14 examining witnesses when opposing counsel began  
15 reading from transcripts. And the Court at that  
16 point, we believe, ruled they cannot do that.

17 I think that's the same issue for  
18 closing. But I guess I'd like clarification from  
19 the Court. My understanding would be that counsel  
20 would not be able to take the transcripts and read  
21 from transcripts to the jury. They're not  
22 evidence. They haven't been admitted into  
23 evidence. And that counsel would not be allowed to  
24 put transcripts of select pieces of testimony up on  
25 the overhead in any fashion.

1 THE COURT: The issue went away and hasn't  
2 come back until now. It was raised as an issue  
3 then was not brought up again. Now it is, and I  
4 suspected this was going to come up.

5 Mr. Li, I --

6 Mr. Kelly, who's going to address that?

7 MR. KELLY: Well, I'm going to allow Mr. Li to  
8 address the transcript issue.

9 THE COURT: Rebuttal issue?

10 MR. KELLY: On the rebuttal issue, again,  
11 Judge, I would emphasize that the three exhibits  
12 proffered by Mr. Li yesterday were developed during  
13 the state's case in chief, period. So there's  
14 nothing to rebut. There's nothing new.

15 And they were played during the state's  
16 case in chief. And they were allowed to be played  
17 after argument and foundation -- or foundation was  
18 laid and argument and -- and admissibility ruling  
19 by the Court. That's substantially different than  
20 what the state offers now, to bring those people  
21 back, essentially, repeat their testimony. So that  
22 would not be allowed as rebuttal.

23 And so, Judge, if it's only those two  
24 individuals, our position is regardless as to  
25 whether or not those three proffered exhibits are

1 admitted, that's simply not the type of testimony  
2 that's allowed as rebuttal evidence.

3 THE COURT: Who's the person other than  
4 Mr. Mercer?

5 MR. KELLY: It was Detective Diskin is what  
6 she said.

7 MR. LI: It was Detective Diskin. I mean,  
8 that's -- that's the whole point is all of this was  
9 played for Detective Diskin to have  
10 Detective Diskin explain, which he did at length,  
11 all the reasons why he pursued one course of  
12 investigation versus another.

13 THE COURT: So it's been covered. And if  
14 Detective Diskin were to be called back, it's --  
15 it's already been covered.

16 MR. LI: It would be the exact same testimony.  
17 Exactly.

18 THE COURT: So Mr. -- excuse me.  
19 Detective Diskin wouldn't be called back because  
20 there's -- in Arizona we have cross-examination to  
21 all areas. And if a witness covers the whole  
22 subject, why would the -- the witness be called  
23 back.

24 In this case it raises different concerns  
25 because of the length of the trial. The Court --

1 you know -- has to follow the rule and have a fair  
2 presentation of evidence, and there may be some  
3 concerns there.

4 But this -- this -- this area has all  
5 been covered. And it's been in -- in the subject  
6 of a lot of argument. And it's -- if it's -- if  
7 it's brought up again in any form, it's going to  
8 bring up the question of rebuttal. Or if  
9 Detective Diskin is called and I permit questioning  
10 on areas that have been covered thoroughly, it's  
11 going to bring up -- you know -- cross-examination  
12 into the -- the whole picture kind of thing.

13 Ms. Polk.

14 MS. POLK: Your Honor, first of all, this is  
15 not an issue at this moment because those clips  
16 have not been admitted as exhibits. The defense  
17 yesterday moved to admit as exhibits three clips.  
18 The time to move to admit them as exhibits would  
19 have been through the testimony of Ted Mercer or  
20 the first one -- and actually I don't know. We've  
21 only heard one of the three.

22 But when the witnesses who can establish  
23 the context for items that are admitted as  
24 evidence -- when they're admitted through those  
25 witnesses, they can establish context. The defense

1 did not move to admit any of this into evidence  
2 when any of these witnesses were on the stand.

3 Now we've gone through all the State's  
4 witnesses. They've gone through their witnesses.  
5 And now at the end of trial, they want to suddenly  
6 move into evidence three clips from witnesses who  
7 testified a long time ago.

8 It deprives the state of the opportunity,  
9 then, to take something that is evidence and  
10 question any witnesses about it, including the  
11 witnesses who were on the stand.

12 I fail to understand how the defense, if  
13 they wanted this moved into evidence, why they  
14 didn't move it into evidence when the witness that  
15 can give the context was on the stand. But they  
16 didn't.

17 THE COURT: Well, I think the one exhibit they  
18 did, and it was -- it came in in a limited capacity  
19 only. That -- the one exhibit that was played is  
20 the one that actually was played but not actually  
21 admitted as an exhibit. And I --

22 MS. POLK: And if I --

23 THE COURT: -- remember that now.

24 MS. POLK: And if I can respond to that.

25 Actually, Judge, at this moment I don't remember

1 what was played of those three clips. Again, we've  
2 only heard one of the three yesterday. The defense  
3 still hasn't provided us with any audios of what  
4 these new exhibits are.

5 If any audio was played, it was played as  
6 impeachment, not as a -- an item of evidence that  
7 would go to the jury. That's a very different  
8 context. I know that counsel was playing some  
9 audio to impeach. And I know that they were  
10 reading from transcripts to impeach.

11 With respect to these three clips that  
12 they now want admitted as evidence, I don't recall.  
13 But none of them have been admitted. None of them  
14 have been admitted. They -- they came in under the  
15 rules for impeachment purposes only, not as  
16 evidence.

17 Now at the end of trial when these  
18 witnesses are long gone, the defense suddenly wants  
19 to go back, have these items marked as evidence.  
20 And if they had been evidence at the time, the  
21 state could have used them. We might have used  
22 them for other witnesses for all that matter.

23 It's just highly unusual when these  
24 witnesses are long gone to suddenly to come back  
25 with audio clips and say, oh, by the way, we want

1 these admitted as evidence.

2 And as I pointed out, Judge, yesterday,  
3 probably most troubling to me is Rule 106, which  
4 would require that these clips, if they come in, be  
5 expanded under the rule of completeness to give the  
6 context to the statements instead of allowing the  
7 defense to isolate a view -- a portion of a  
8 conversation that they want and not give the  
9 conversation that occurred before and the  
10 conversation that occurred after.

11 THE COURT: And, Mr. Li, I think you were the  
12 attorney doing the examination when the one clip  
13 came in. Correct?

14 MR. LI: Yes, Your Honor.

15 THE COURT: Wasn't that the instance where I  
16 actually asked for a bench conference and  
17 explained or elaborated on the ruling, and then you  
18 didn't close your cross and then -- is that the  
19 clip? Is that the excerpt?

20 MR. LI: Yes, Your Honor, to my best  
21 recollection. But -- but they were also played to  
22 Detective Diskin. So I -- I just -- I have to  
23 correct this discussion by the county attorney that  
24 they're only played for impeachment purposes.  
25 That's simply not the case.

1 In my particular case, in questioning  
2 Mr. Mercer, they were certainly played to show the  
3 tone of voice, the fact that he had -- you know --  
4 said this immediately and all of those sorts of  
5 things. When they were being played for  
6 Detective Diskin, they were played for another  
7 purpose, which is the same as the organophosphates  
8 tapes, which is to show the various reasons -- or  
9 various clues that the -- the detective was given.

10 The rule of completeness does not apply  
11 to this. We are simply just asking the Court, can  
12 we admit this so we can play it in closing? That's  
13 all -- that's all this is about. We're not going  
14 to play it again in front of the jury. We just  
15 want to play it for closing because that is  
16 evidence in this case. That's -- that's the only  
17 reason why this -- this -- this conversation is  
18 occurring.

19 And -- and -- and the problem is if you  
20 don't allow us to play it in court, then what I  
21 have to say is, you'll recall, ladies and gentlemen  
22 when you heard the tape that says blah, blah, blah,  
23 and I'll be reading from the transcript, which  
24 apparently the state also doesn't want us to use.  
25 And then the Court will instruct that what the --

1 what the -- what the witnesses say -- sorry. What  
2 the lawyers say is not evidence, when, in fact, it  
3 was evidence.

4 And that's -- so -- so that's the only  
5 reason that this -- this whole issue arises. I  
6 don't understand the complication that -- that it's  
7 creating. I don't understand why the state would  
8 want to violate the rules of evidence to include  
9 hearsay -- I mean to admit everything under the  
10 guise of Rule 106. That's just not the rules of  
11 evidence. All we're --

12 THE COURT: This is the argument we had  
13 yesterday.

14 MR. LI: Yes. I understand. And -- and I'm  
15 just trying to explain, Your Honor. The easy thing  
16 is that's all we're trying to do so that we can  
17 say, look. These are things that -- that  
18 Detective Diskin was presented. That's it. And  
19 I'm willing to submit. I mean, I just --

20 THE COURT: Well, I was the one that suggested  
21 this as being, well, no. The state suggested it  
22 could be a 106 type aspect. I certainly think that  
23 rule has really been I'd say stretched in this  
24 case. Certainly been brought up frequently.

25 MR. KELLY: And, Judge, if I may, there's been

1 nothing sudden about this. There -- there have  
2 been clips since opening that throughout the course  
3 of trial have been frantically prepared by both  
4 sides and admitted.

5 And -- and as Mr. Li just said, we do not  
6 intend to publish the three clips to the jury in  
7 the defense case in chief. All we're trying to do  
8 is make the record complete. And so there --  
9 there's nothing sudden about it. And it was played  
10 in the state's case in chief and out of fairness  
11 ought to be admitted.

12 But, regardless, Judge, I was addressing  
13 the rebuttal aspect. And whether those tapes are  
14 admitted or not and has -- does not entitle the  
15 state to bring those witnesses back for that  
16 purpose. It was addressed during the case in  
17 chief.

18 THE COURT: And that's the argument also. If  
19 it was all done in the case in chief, why is it  
20 going to come up even in the defense case again?  
21 And you're saying for a very specialized reason, so  
22 it can actually be brought before the jury in a  
23 different form of closing. As I indicated, I will  
24 have to have a ruling.

25 MR. LI: Your Honor, may address the issue of

1 transcript?

2 THE COURT: You can. But I'm -- I'm not -- I  
3 want to say this: To bring up one little  
4 isolated -- this is -- this aspect of this one  
5 thing, it certainly brings up if there were  
6 witnesses, I've said, cross-examination issues. It  
7 brings up possible rebuttal. Is it new? It's not  
8 new. If it's not new, why is it coming up? And if  
9 it's -- if it's coming in, it's likely going to  
10 result in the state being able to do something as  
11 well given the context.

12 I know you totally disagree with that,  
13 Mr. Li.

14 MR. LI: Okay. Well, then I'll submit I don't  
15 understand the Court's ruling on -- in that regard.

16 THE COURT: Well, I made -- I haven't made a  
17 ruling either. Certain -- just the logic of it.  
18 To bring up one isolated piece of evidence and not  
19 have the other party able to do anything with it at  
20 all. Just there it is --

21 MR. LI: They did do something with it, Your  
22 Honor. We -- we had -- we had hours --

23 THE COURT: If they did something with it,  
24 Mr. Li, it implies you did something with it before  
25 too. So -- you know -- what -- so -- so we -- is

1 it just that part the only thing that's going to be  
2 brought back?

3 MR. LI: We're not going to play it. It's for  
4 closing arguments, Your Honor. It's literally the  
5 same as, and ladies and gentlemen, you heard the  
6 tape. Mr. Mercer said blah, blah, blah, blah,  
7 blah. Okay? Or, ladies and gentlemen, you heard  
8 the tape. Click, Ted Mercer saying the exact same  
9 thing.

10 That's -- the jury has already heard --

11 THE COURT: Now you've got a whole different  
12 argument going as to -- and I brought this up.  
13 Couldn't you be doing this at closing argument.  
14 Ms. Polk -- you anticipated an objection.  
15 Ms. Polk, in fact, did object to that. That's a  
16 whole different question as to whether or not that  
17 might be played.

18 MR. LI: I just want to play it, Your Honor.

19 THE COURT: Oh, I -- I --

20 MR. LI: It's evidence in this case. And  
21 if -- if the Court tells us that we can't play it  
22 and then I -- I read, and you heard Mr. Mercer say  
23 blah, blah, blah, blah, blah, and then I -- you  
24 know -- we -- the jury receives an instruction that  
25 what I say is not evidence, that seems to put us in

1 a -- in a rather awkward position, since, in fact,  
2 it is evidence and, in fact, it's state's exhibit.

3 In the state's case, in fact, the jury  
4 did hear exactly the words that I would be reading  
5 from the same transcript that all I would have to  
6 do is press a button and have the exact same words  
7 come out.

8 THE COURT: I'm doing this in isolation again.  
9 I don't -- I don't have the -- the transcripts that  
10 surround it. So there's no point in arguing that  
11 anymore right now. I don't have the transcripts  
12 that -- that help me frame the argument.

13 With regard to using transcripts,  
14 something that doesn't happen in most trials --  
15 they're not available and they're not used -- I  
16 have a -- a problem with -- and, Mr. Hughes and  
17 Ms. Polk, an argument that we need to all be more  
18 inaccurate. That's -- that's the fairness. Let's  
19 be inaccurate when there's a means of not being  
20 inaccurate. That I have a concern with.

21 If -- if there's the technology now that  
22 there can be accurate testimony, that's what the  
23 jurors should have, is accurate accounting of the  
24 testimony, recounting of the testimony in closing.

25 And I think I suggested just -- you



1 know -- the issue was solved so I didn't have to  
2 make a ruling on it. But that if it's not -- it's  
3 just not lending more sanction to it or authority  
4 to it than -- than what's there. But precise  
5 language. Why wouldn't you use precise language?  
6 Why -- why would you not use the most accurate form  
7 of -- you know -- summary of the evidence  
8 available?

9 MS. POLK: Your Honor, the -- the jury does  
10 not get a transcript. The jury is told ahead of  
11 time you're not going to get a transcript and you  
12 need to rely on your notes. They don't get a  
13 transcript. And, of course, you know the state  
14 doesn't have a transcript.

15 But what you end up with, then, is one  
16 party with the ability to take pieces of  
17 information and give it this aura of reliability  
18 because it's coming from a transcript.

19 And it's interesting -- why doesn't the  
20 jury get a transcript, then? If the -- if the  
21 concern is that the jury gets the most accurate  
22 information available, why don't they get the  
23 transcript? It's -- what we end up is a situation  
24 where we've told them ahead of time, you're not  
25 going to get a transcript. You have to rely on

1 your memory and your notes. And then suddenly they  
2 see that one party apparently has a transcript.  
3 And what does that do to what we've told them ahead  
4 of time?

5 If we want to get the jury to get the  
6 most accurate recollection, then -- then maybe we  
7 should give them an entire transcript and let them  
8 go back.

9 THE COURT: Issue you don't see often in a  
10 case.

11 MR. KELLY: Judge --

12 THE COURT: Mr. -- Mr. Kelly or whoever wants  
13 to address that.

14 MR. KELLY: I -- I have tried both civil and  
15 criminal cases with transcripts. And I -- I agree  
16 that -- that a -- an attorney cannot intentionally  
17 misrepresent the facts in his or her closing  
18 argument. What better way to make sure that you're  
19 not misrepresenting the facts than to refer to a  
20 transcript.

21 THE COURT: I -- I don't --

22 MR. KELLY: And I think there's a whole  
23 different reason why transcripts aren't provided to  
24 juries. It's a different issue. When the -- I  
25 believe it was back in the '90s when the -- there

1 was a commission developed to study these new rules  
2 to that would apply to juries such as the jury  
3 questions and so forth and actually talked about  
4 restructuring the entire court system in Arizona.  
5 And -- and that issue was discussed is my  
6 recollection. And it was decided the jurors should  
7 not have transcripts. That's pretty much the way  
8 it is.

9 But this issue is whether Mr. Li can be  
10 more accurate in his recollection as to what the  
11 facts are and make an argument. And simply to  
12 encourage us not to be inaccurate makes no sense.

13 And the final thing I'd mention is, this  
14 is the State of Arizona talking. It would be a  
15 different argument if I were in a case with an  
16 indigent client who did not have access to a  
17 transcript and the state had a transcript.

18 But here we're talking about the State of  
19 Arizona is complaining about not having a  
20 transcript. And all they have to do is write a  
21 check, and they can have a transcript. So I  
22 don't -- I don't see any impropriety or unfairness.

23 THE COURT: Reply, Ms. Polk.

24 MS. POLK: Your Honor, just I would ask for  
25 the authority for the information Mr. Kelly just

1 provided to the Court about use of transcripts.  
2 The reality is transcripts typically are not  
3 available. Typically you don't have parties  
4 purchasing the transcripts, at least in criminal  
5 cases. And this discussion by Mr. Kelly -- I -- I  
6 would just like to see the authority for that.

7 I agree that the jury should get the most  
8 accurate information possible. The issue with the  
9 transcripts is it can't result in the opposite. It  
10 allows a party to pull out -- the same discussion  
11 we're having about Mr. Mercer's testimony. It  
12 allows them to pull out isolated pieces that -- and  
13 emphasize and give an aura of reliability to those  
14 isolated pieces out of a witness's entire  
15 testimony.

16 If counsel wants to quote from a  
17 transcript about what a witness has said, then  
18 perhaps they should give the jury the entire  
19 transcript of that witness's testimony. Otherwise,  
20 you're allowing counsel to pull out just the piece  
21 of Mr. Mercer's testimony where he talked about the  
22 wood, give it this aura of reliability by showing  
23 them the actual transcript and then not talk about,  
24 well, before he even mentioned the wood, he talked  
25 about how extreme Mr. Ray's events are.

1 That's the problem. It unduly emphasizes  
2 a portion of testimony, makes the jury, who doesn't  
3 have a transcript -- all of a sudden there's this  
4 extra aura of reliability to portions. And yet,  
5 they don't have the entire transcript.

6 THE COURT: I -- everything I said at the  
7 start, that's still how I see it. I -- I can't see  
8 an argument that people should be paraphrasing  
9 and -- and inviting multiple objections, misstates  
10 the evidence, misstates the evidence, when it's  
11 going to be stated exactly -- or very, very close,  
12 much better than recollections and -- and notes.

13 So if there's law to the contrary,  
14 Ms. Polk, I'd -- I'd certainly want to see it.  
15 I -- I -- people are entitled to -- to use  
16 technology and have accurate summaries of  
17 testimony. And, of course, in closing arguments,  
18 that's what they are. They certainly emphasized  
19 different points.

20 So transcripts can be used.

21 MR. LI: Your Honor?

22 THE COURT: Yes.

23 MR. LI: Thank you.

24 I want -- I want to finish this trial.

25 And -- and -- and if we can come to an agreement

1 that we would withdraw the -- the Exhibits 1084  
2 through 86, I believe, which are the three tapes.

3 THE COURT: Well, they're offered at this  
4 point. Yes.

5 MR. LI: Withdraw them as an offer but be  
6 permitted to play them as they were played in front  
7 of this jury during trial, to play them during  
8 closing arguments, we -- we would withdraw our --  
9 our offer. Because I think -- anyway. I think  
10 that would solve the problem. It would allow me  
11 to -- to not have to have the words that I say be  
12 qualified by the Court's instruction, which will be  
13 that what the lawyers say is not evidence.

14 The jurors, in fact, did hear it. It was  
15 evidence -- you know. It was played. We have made  
16 a recording of those tapes so that the record is  
17 complete as to what evidence the jurors heard.

18 The various witnesses talked about the  
19 exact evidence that the witness heard. And -- you  
20 know -- instead they won't be able to take them  
21 back into the jury room and play them out of  
22 context or whatever the concern that the state has.

23 It can't be -- the concern cannot be that  
24 the -- that parties are not allowed to look at  
25 particular pieces of evidence and emphasize them to

1 jurors. That's what we do in closing arguments.

2 So I -- I think if -- if all we do is  
3 simply play those -- the -- the -- I may not even  
4 pray all three. I mean, I just -- I just want the  
5 ability to do it, to play those three clips, which  
6 is evidence that the jury heard so that the jurors  
7 can hear what they heard again.

8 And if -- if we -- if we can have that as  
9 an agreement, then -- then we'll withdraw it. And  
10 we won't have to have this -- you know -- threat of  
11 rebuttal witnesses that -- that will be testifying  
12 about things that they already testified about. I  
13 think we're ready to finish this case. And I think  
14 this would be a solution to it, Your Honor.

15 THE COURT: I brought this up at the start of  
16 the argument. It went towards admissibility, and  
17 Ms. Polk indicated she was going to object to them  
18 being played, and I would imagine for the same  
19 reasons that have been stated.

20 Anything to add to that?

21 MS. POLK: Your Honor, just that if counsel  
22 wants to prepare an expanded audio clip that gives  
23 fair context to the comments, then perhaps we can  
24 come to some agreement.

25 But I'm -- I'm not going to keep

1 repeating the argument. The Court knows that the  
2 state believes that if it's being offered to argue  
3 the direction that Detective Diskin's investigation  
4 took, then fair context would be the other  
5 information that was received at the same time  
6 because that affected the direction that the  
7 investigation took.

8 But other than that, to just allow  
9 counsel to play this isolated clip, which is not  
10 evidence, again, violates the rules, and the state  
11 would object to that.

12 MR. LI: Your Honor, it's -- it's -- the  
13 idea -- then -- then I would -- I would request  
14 that -- that every argument that Ms. Polk makes  
15 that comments on the evidence also include the  
16 various exculpatory points that -- that -- that  
17 need to be made. So that when she wants to comment  
18 on a particular piece of evidence, that she also  
19 mentions the fact that four doctors can't exclude  
20 organophosphates. That's not the rules.

21 All I'm trying to do is play the evidence  
22 the jurors have already heard. That's literally  
23 all I'm trying to do. There is no Rule 106  
24 argument in closing arguments. There's no rule  
25 that applies to that. That's doesn't -- that's not

1 how it works. So I think this is a -- this  
2 argument is -- is not correct.  
3 So I would ask the Court that this would  
4 resolve this issue quite simply. It's not being --  
5 we're not -- it's not going to be introduced.  
6 The -- the actual clips themselves are not going to  
7 be brought back to the jurors.

8 But the reality is, Your Honor, Ms. Polk  
9 is incorrect. It is actually in evidence in the  
10 sense that the jurors heard this. We have made a  
11 record of what they heard by giving the -- by  
12 giving the -- the -- the clerk an exhibit and  
13 giving the Court an exhibit of exactly what they  
14 heard. And all we would be doing is playing the  
15 exact evidence that they've already heard.

16 And I think we could resolve this issue.  
17 We don't have to have rebuttal. We don't have to  
18 have Rule 106 issues. It's just argument,  
19 commentary on evidence, that folks have already  
20 heard. That's all we're trying to do.

21 THE COURT: As I indicated, it would help  
22 me -- it can be difficult. I'd like to see the  
23 context in which these items were admitted. I  
24 remember the one bench conference. I have a  
25 recollection of that. I don't even know what the

1 other two clips are. I heard one yesterday that I  
2 asked to be played. So that's -- that's all I'm  
3 going to say. It's noon.

4 And I really would like to have copies of  
5 the instructions so I can look at those so --  
6 before I start talking about them. You know, I  
7 looked at them rather than just trying to read them  
8 and go from there. I don't know how --

9 Ms. Rybar, are those the ones Diane  
10 prepared?

11 I -- you know -- I normally look them  
12 over. I haven't even looked those over.

13 So this is just a draft that was put  
14 together from the request of both sides for  
15 standard instructions. So I want -- I want them to  
16 have those now. But I don't want anybody to think  
17 that that's somehow some final product in any way.  
18 It was my judicial assistant just getting something  
19 down that has been requested by the parties.  
20 That's all that is.

21 Ms. Polk.

22 MS. POLK: Your Honor, if I can have a moment  
23 with counsel?

24 THE COURT: Of course.

25 MS. POLK: Your Honor, what I was consulting

1 with counsel on is the state still needs time to  
2 work on our proposed instructions. I don't know if  
3 the Court was going to ask us to come back at 1:30.  
4 But what we would ask is to have a few hours this  
5 afternoon before we come back into court and then  
6 we can finish our work, get it to Court and  
7 counsel.

8 THE COURT: I do want to start on instructions  
9 this afternoon. So what time are you suggesting,  
10 Ms. Polk?

11 MS. POLK: 3:00 o'clock.

12 THE COURT: Can we do anything before that?

13 MS. POLK: Well, Your Honor, we've received  
14 nothing from defense counsel. I don't know if they  
15 have proposed instructions. But wouldn't the Court  
16 like the parties to see what's being submitted  
17 before we're in front of you?

18 THE COURT: I want to see what's submitted  
19 before --

20 MS. POLK: And have you received --

21 THE COURT: I talk about it.

22 MS. POLK: Have you received anything from --

23 THE COURT: Not that I -- not --

24 MR. LI: Not yet, Your Honor.

25 THE COURT: Did we agree -- does Diane have

1 something?

2 MR. LI: Not yet. I think Miriam has them in  
3 her hands and is going to run down -- I guess you  
4 can file them here.

5 THE COURT: Let's try 2:00 o'clock. Let's  
6 get -- get everything exchanged that we can. And  
7 we get -- and if we -- Ms. Polk, if we're just not  
8 to a point we can do something, then we'll -- we'll  
9 have to schedule. Let's try 2:00 o'clock.

10 MS. POLK: Thank you.

11 THE COURT: Thank you.

12 (Recess.)

13 THE COURT: The record will show the presence  
14 of Mr. Ray and the attorneys. And this is the time  
15 set to continue the discussion of legal matters.  
16 For one thing, the instructions. And I've had a  
17 chance just to look through briefly what's been  
18 submitted. It might be most useful just to argue  
19 the instructions that are likely to be contested.  
20 So I can hear that and get started there.

21 But one issue that's -- that remains has  
22 to do with the three exhibits that were proposed.  
23 1084, 85, and 86.

24 Mr. Li, were those exhibits admitted  
25 during the trial, all three of them?

1 MR. LI: I'm sorry. 1084 through 86?  
 2 THE COURT: Yes.  
 3 MR. LI: They were not admitted -- well, they  
 4 were played during the -- depends on what you mean  
 5 by "admitted." The actual clips themselves were  
 6 not admitted. But they were played for the jury,  
 7 so they are in evidence.

8 THE COURT: And a record was made. Okay.  
 9 Okay. I just wanted to -- to clear that up. I've  
 10 asked for the -- the context around them in -- in  
 11 terms of what discussion went into having them  
 12 played.

13 What the -- excuse me -- recording  
 14 actually represents is what would have happened if  
 15 Mina would have made a transcript of them,  
 16 essentially, in some respects.

17 Mr. Kelly.

18 MR. KELLY: Sorry for interrupting, Judge.  
 19 But if you wanted the transcripts, we can provide  
 20 those. We were focused on the jury instructions.

21 THE COURT: No. That's okay. That's okay.  
 22 And the other thing is both sides need to have a  
 23 ruling on that. And let's -- let's deal with the  
 24 jury instructions.

25 Normally start with the state, Ms. Polk.

1 And let's start with special instructions.

2 MR. HUGHES: Your Honor, with respect to  
 3 the -- to the state's instructions, we obviously  
 4 have a number of the RAJIs. By special  
 5 instructions, if you include the modifications of  
 6 standard instructions, the first one would be found  
 7 on page 3, which is the modification to standard  
 8 criminal 2.03 pertaining to causation.

9 On page 3 there is some additional  
 10 language which is cited. The additions to the RAJI  
 11 are cited in italicization. And the state is  
 12 requesting that the Court provide this instruction  
 13 as prepared, omitting the citations to authority  
 14 that support the various additions to RAJI 2.03.  
 15 We believe it correctly sets forth the law. The  
 16 source of the authority is either the statute or  
 17 from Arizona case law.

18 THE COURT: Ms. Seifter, are you going to  
 19 handle the --

20 MR. KELLY: All right. Judge, I apologize.  
 21 You know, we've had 20 or 30 minutes. We were just  
 22 presented with this, and we're somewhat taken aback  
 23 by the proposed jury instructions.

24 If I understand 13-203, based on my  
 25 experience, is that's the transferred-intent

1 statute. And I -- I guess I'd need more  
 2 explanation from the government as to why they  
 3 believe there's an -- a sufficient factual basis to  
 4 assert transferred intent.

5 As to subparagraph 1, the actual result  
 6 differs from the probable result only respect that  
 7 a different person is injured. Are they saying  
 8 that our client recklessly endangered, so to speak,  
 9 Mark Rock but the -- that James Shore was injured?  
 10 That's the classic transferred-intent scenario. We  
 11 simply don't see that as applicable.

12 And then I don't see any basis for the  
 13 second part. The actual result involved similar  
 14 injury or harm as the probable result. And the --  
 15 what Mr. Ray -- and this is not disputed. What his  
 16 intent was, it was to conduct a sweat lodge event.  
 17 That was the intent.

18 So I guess the only thing -- and -- and  
 19 again, we haven't had a lot of time to consult.  
 20 But if they're saying that his intent in creating  
 21 an altered mental status, the probable result -- or  
 22 his intended result -- excuse me -- resulted in  
 23 death by heat stroke, I just don't believe that  
 24 falls under the purview of 13-203, the  
 25 transferred-intent statute.

1 And then there's this very important  
 2 practical distinction. And that is the -- the  
 3 government has requested the standard about  
 4 lesser-included offense, RAJI No. 22, which if this  
 5 Court is going to provide the jury with a negligent  
 6 homicide instruction, this statute here would  
 7 completely confuse that particular provision. The  
 8 standard -- that is something I'm familiar with.

9 And my recollection of standard No. 22 is  
 10 that something along the lines, if you cannot  
 11 unanimously agree as to the crime of manslaughter,  
 12 then you must consider whether the crime -- the  
 13 lesser-included offense of negligent homicide  
 14 occurred. If you cannot unanimously agree with  
 15 that, you must acquit the defendant.

16 And if you look at this particular  
 17 statute, it -- it blurs the culpable mental state  
 18 between the definition of "recklessness" with  
 19 "criminal negligence." So it would be, I would  
 20 submit, error to -- to provide this jury in its --  
 21 in its current form.

22 Just reading Rule 21.3, and we want to  
 23 make sure that the record reflects that we object  
 24 to this modification of the standard RAJI criminal  
 25 2.03 and that we are willing to stand here for a

1 great deal of time to articulate a specific basis  
2 for that objection if necessary.

3 But I think we've made a record it's  
4 simply not applicable unless we hear -- well, it's  
5 just not applicable. I haven't heard enough  
6 information from Mr. Hughes other than they simply  
7 want it.

8 And I believe any jury instruction has to  
9 be based on a reasonable interpretation of the  
10 factual information provided to the jury as well as  
11 the appropriateness and applicability of Arizona  
12 law. In this particular situation, both those  
13 bases would -- would fail.

14 So as to the italics on page 3, that  
15 would be our objection, Judge.

16 THE COURT: Mr. Hughes.

17 MR. HUGHES: Your Honor, with respect to the  
18 italicized language on page 3, it -- this is a --  
19 it's a separate jury instruction that was placed in  
20 there. With respect to the -- the italicized  
21 language next to -- to item 1, the actual result  
22 differs from the probable result, I don't think  
23 that necessarily applies in this case. It was  
24 the -- the language above that says, if one of the  
25 two apply. And that was the first, and then

1 there's the second.

2 It's the state's belief that the language  
3 next to No. 2, the actual result involved similar  
4 injury or harm is the probable result and occurs in  
5 a manner which the person knows or should know is  
6 rendered substantially more probable by such  
7 person's conduct. That's the part that should  
8 follow the first italicized paragraph.

9 The state would not oppose omitting the  
10 language next to No. 1, the -- the paragraph  
11 beginning, the actual result differs from the  
12 probable result.

13 Your Honor, in response to Mr. Kelly's  
14 query, it is the state's belief that the evidence  
15 support the fact that in this particular case the  
16 jury can find facts that the defendant was  
17 attempting to introduce an altered mental state in  
18 the persons who are participants and that that  
19 actual result that -- that occurred involved a  
20 similar injury or harm, which is -- the actual  
21 result being heat stroke involved the similar  
22 injury or harm which was the altered mental state,  
23 which the medical doctors have testified is one of  
24 the hallmarks of heat stroke.

25 And then the other element of heat

1 stroke, which is the increased heat, would -- the  
2 jury can find the defendant intended that based on  
3 his running of the lodge and his statements about  
4 how hot his lodge would be.

5 THE COURT: I think one thing that can be  
6 resolved right now is, No. 1 under 3 there just  
7 would not apply. It's -- it's reversed.

8 MR. HUGHES: We would agree that should be  
9 removed.

10 MR. KELLY: Judge?

11 THE COURT: Yes.

12 MR. KELLY: The difficulty with the fact  
13 pattern in this case is that blurs the distinction  
14 between 13-203(c)(2) and 13-105(10)(c). And -- and  
15 what I'm pointing out is the culpable mental state  
16 for recklessness.

17 And this jury has to find that Mr. Ray  
18 was aware of and consciously disregarded the  
19 substantial and unjustifiable risk that the result  
20 will occur, the circumstance exists. Must be a  
21 gross deviation from the standard of conduct a  
22 reasonable person would observe in that situation.  
23 And the risk, of course, is death.

24 In this particular 13-203, the  
25 transferred-intent statute is applicable for

1 different crimes. And it is the actual -- a jury  
2 could be completely mislead by this language that  
3 the person knows or should know is rendered  
4 substantially more probable by such person's  
5 conduct. That's the government's argument that  
6 his -- his intended result is conducting a sweat  
7 lodge with an altered state.

8 We heard testimony that altered states  
9 include such things as anger and love. And we  
10 heard testimony from medical providers as to a  
11 different definition. But Mr. Ray is not a  
12 licensed medical doctor. He's a layperson who was  
13 using altered state language or the definition of  
14 that term as the lay witnesses defined it.

15 And I believe it was Melissa Phillips, my  
16 very first witness, where we asked a series of  
17 questions about what an altered state is in this  
18 context.

19 So this jury is going to be significantly  
20 misled, and -- and it would be an erroneous verdict  
21 if they unanimously decided according to  
22 Mr. Hughes' argument that if the intent is to  
23 create this altered state and that Mr. Ray knew or  
24 should have known is rendered substantially more  
25 probable by conducting the sweat lodge. That's --

1 that's almost a civil standard in this factual  
2 circumstance.

3 And -- and so I -- I, again, Judge,  
4 object. I believe it's reversible error and can  
5 lead to an erroneous verdict of guilt.

6 I -- I -- I believe that -- trying to  
7 think of an example of when the transferred intent  
8 in regards to conduct would apply. And the -- and  
9 the thing of think of is if you shoot someone  
10 intending to wound them and they die of bleeding  
11 and the -- and the testimony at the trial is, oh,  
12 he was intending to wound the person not kill him,  
13 then this statute would apply. But those are not  
14 the circumstances here.

15 My client was intending on putting on a  
16 seminar, and this tragedy occurs. And simply  
17 because during that time he mentions -- and I think  
18 it's Exhibit 141 -- you'll reach an altered state  
19 does not allow the government now to obtain a  
20 conviction on this lesser standard of culpability.

21 MR. HUGHES: Your Honor, again, this  
22 instruction deals with conduct and causation, not  
23 the elements of the offense. In fact, numbered  
24 paragraph 2 in this instruction makes it clear the  
25 relationship between the conduct and the result

1 satisfies any additional causal requirements  
2 imposed by the definition of the offense.

3 The jury is going to be instructed to  
4 look to the -- the definitions of the offense as  
5 far as mental -- the -- the interplay between mens  
6 rea and actus reus. This instruction here explains  
7 how his mens rea pertaining to conduct can differ,  
8 and it correctly sets forth the law. 13-203  
9 explains how it can differ but yet still hold him  
10 responsible.

11 And there's -- I don't see an  
12 inconsistency, Your Honor. This is directly from  
13 the statute and accurately sets forth the law.

14 MR. KELLY: And, Your Honor, if I may just  
15 briefly reply. They took 13-203(c)(1) and (2) and  
16 intersected them inside of the RAJI 2.03.

17 THE COURT: Counselor, could you help me?  
18 Would you repeat that, please.

19 MR. KELLY: They took that portion of -- we  
20 have a RAJI, which is 2.03. And they interjected  
21 this transferred-intent aspect to it. Again,  
22 there's simply no factual basis to give it for the  
23 reasons I've stated. And more importantly, I  
24 believe it blurs the distinction between the  
25 culpable mental states of both the manslaughter and

1 negligent homicide if this Court's going to give a  
2 lesser included.

3 MR. HUGHES: And, Your Honor, all portions of  
4 this, including the beginning of the instruction,  
5 come from the same statute, 13 -- 13-203. The  
6 first paragraphs, 1 and 2, which are part of the  
7 standard RAJI, are numbered (A)(1) and (A)(2). And  
8 then the additional language comes from numbered  
9 paragraph (C) of the same statute.

10 The state would have no opposition in  
11 breaking that out into a different instruction,  
12 however, I do think it naturally flows. The  
13 drafters of Arizona statutes apparently thought it  
14 naturally flows because they are included within  
15 the same statute, ARS 13-203.

16 MR. LI: Your Honor, the issue isn't so much  
17 whether or not this is a correct statement of the  
18 law under certain circumstances when appropriate.  
19 And -- you know -- statutes are drafted in ways, as  
20 the Court is well aware, that are sometimes a bit  
21 difficult for the layperson to understand. And  
22 that's why jury instructions attempt to -- you  
23 know -- break it all out and make it more explicit  
24 for the jurors and more applicable to the specific  
25 facts of the case.

1 The problem with jamming this particular  
2 section into the standard causation instruction is  
3 that it, in fact, does blur the mens rea  
4 requirement. Those are very separate offenses.  
5 And under -- under the lesser-included offense  
6 instruction, the -- the jurors actually have to  
7 make specific findings before they go on to the --  
8 to the -- to the lesser included.

9 And -- and there is's reason for that.  
10 There's a reason why they want to keep these things  
11 separate, because they don't want people to not --  
12 to be agreeing on -- on different things without --  
13 without having -- you know -- a clear idea of what  
14 the -- what the issue is.

15 And so the problem with this particular  
16 instruction is that it just -- it -- it -- it  
17 includes both mental states in the causation --  
18 should have known and did know. Those are --  
19 that's a conflation of two different offenses.

20 MR. HUGHES: And, Your Honor, I think that  
21 concern will be dealt with in the instructions  
22 dealing with -- dealing with the lesser included.  
23 This instruction is clear if recklessly or  
24 negligently causing a particular result is an  
25 element. It makes it clear that it -- it -- with

1 respect to the causation element, the law in ARS  
2 13-203 makes it very clear the law does not  
3 distinguish between the reckless or the negligence  
4 when you're dealing with the situation discussed in  
5 13-203(c)(1) and (c)(2).

6 The law does make a very big distinction  
7 when the jury is making the determination of which  
8 was crime was committed, the greater offense or the  
9 lesser offense. That's dealt with -- with the  
10 requested instruction on lesser included and also  
11 with the statutory instructions for negligent  
12 homicide, criminal negligence, which would be  
13 defined in 1.05(6)(d), and the included mental  
14 state, which would be included in 15-603.

15 MR. LI: The problem with this particular  
16 section, Your Honor, is it reads almost as if it --  
17 it were an exception. It is a modification of  
18 normal causation rules. And it's -- it's --  
19 it's -- it's an exception, basically. And the  
20 problem with exceptions is it's not clear to what  
21 it applies.

22 Also --

23 MR. KELLY: Judge, I'd ask you to take a look  
24 at the language of 13-203(c). And I believe it  
25 explains why it simply does not apply. It says,

1 and the actual result is not within the risk of  
2 which the person is aware.

3 If I understand the government's  
4 argument, the reason they want this is they're  
5 saying that heat -- on the continuum the spectrum  
6 of heat-related illness, the culmination of which  
7 is heat stroke and death. Along that continuum,  
8 altered mental status is a sign or symptom of heat  
9 stroke.

10 So this statute only applies when the  
11 actual result, the heat stroke, was not within the  
12 risk, which is the heat-related illness, mental  
13 status change of which the person is aware. It's  
14 simply not applicable. It's -- it's a misuse of  
15 transferred intent.

16 THE COURT: I'm going to -- to look at some  
17 cases and deal with (c)(2).

18 MR. KELLY: And Judge, if I may, I believe on  
19 page 3 of our requested RAJI, it's 2.03, we do have  
20 the correct definition of -- of -- of the jury  
21 instruction which should be provided to the jury.

22 And -- and if we flip to page 4, there  
23 are additions added by the state relating to an  
24 intervening force and an intervening offense. And  
25 it's not in the RAJI -- in the RAJI instruction.

1 MR. HUGHES: Your Honor, with respect to the  
2 language on page 4, again, that language comes --  
3 is -- is -- comes from the cases that are cited as  
4 the source. It pertains to causation and would be  
5 appropriate to include in the causation  
6 instruction.

7 MR. LI: Your Honor, the problem with the  
8 inserted sections there are that the Arizona  
9 Supreme Court in State v. Bass, which is cited in  
10 the pattern instructions, dealt with issues  
11 relating to superseding events. And it says quite  
12 clearly, a superseding event is that -- is that --  
13 was unforeseeable by the defendant and with the  
14 benefit of hindsight may be described as abnormal  
15 or extraordinary.

16 That is -- that is how Arizona and the  
17 Arizona Supreme Court has asked that the Court  
18 instruct jurors on the issue of superseding,  
19 intervening causes. These cases cited by the state  
20 are not applicable to this particular situation.

21 Slover is a drunk driving case. Courts  
22 throughout the country have found that when you  
23 drive drunk, a lot of thing can -- you know -- can  
24 result from that. So whether the -- the victim of  
25 the accident dies because of the impact of the

1 crash or, in Slover, because of the impact of the  
2 crash and then they fell into a creek and drowned,  
3 those kinds of -- or the fact that he wasn't  
4 wearing a safety belt.

5 Those sorts of facts courts throughout  
6 the country have found to be within the  
7 foreseeability of -- of -- of driving drunk. This  
8 is a sweat lodge case. It is not the case that --  
9 that it can't be handled by the standard in  
10 superseding, intervening event.

11 Our argument, Your Honor -- I know the  
12 Court is well aware. Our argument is there was a  
13 toxicity. There might have been a toxicity. But  
14 the state hasn't proven that there wasn't a  
15 toxicity involved. And that the toxicity is not  
16 foreseeable. That's addressed directly by the  
17 superseding, intervening instruction in 203.

18 The -- it can't be the rule that if  
19 Mr. Ray somehow conducted the sweat lodge in a  
20 negligent way that a toxin that is -- is not  
21 foreseeable is also now Mr. Ray's responsibility.  
22 That's just not the law. And it's not the same as  
23 a drunk driving case in any way.

24 And so as a consequence exists, these  
25 two -- and there's two sections here. The

1 intervening force is not a superseding cause if the  
2 defendant's negligence creates a very risk. That's  
3 one they italicized "insertions" and the state  
4 would like to add.

5 The other one is the -- the intervening  
6 event is not a superseding cause where the  
7 defendant's conduct increases. These are -- these  
8 are both additions that are unsupported by the law  
9 for this particular case. If this were a drunk  
10 driving case, it might be different. But it's not  
11 a drunk driving case.

12 Moreover, these -- the cases cited by  
13 the -- the state are appellate cases from 2009.  
14 The Arizona Supreme Court has dealt with how to  
15 deal with superseding, intervening causes. And the  
16 RAJI has the exact language that the Arizona  
17 Supreme Court adopted. And that's why it's in  
18 there. It deals exactly with it. Is it  
19 foreseeable with the benefit of hindsight? May it  
20 be described as abnormal or extraordinary?

21 MR. HUGHES: Your Honor, the -- the Bass case,  
22 which Mr. Li refers, is a source for the paragraph  
23 that is on page 4 beginning, proximate cause does  
24 not exist. The state agrees that's appropriate.  
25 Bass did not deal with this situation that occurs

1 in this case, which the facts indicate would  
2 support the instruction, an intervening force is  
3 not a superseding cause if the defendant's  
4 negligence creates the very risk of harm that  
5 causes the injury. It's the specific situation.

6 The Slover dealt with that and indicated  
7 that is a correct statement of the law when the  
8 defendant's negligence creates the very risk of  
9 harm that caused the injury.

10 There is evidence in this case to support  
11 the giving of that instruction. Bass does not say,  
12 unlike the Portillo, this shall be the instruction.  
13 There should be no other instruction.

14 Bass dealt with a particular case and  
15 talked about superseding, intervening events under  
16 the circumstances that Bass dealt with but did not  
17 say this is the only instruction that can be given.  
18 That would be, I think, a reckless interpretation  
19 of Bass.

20 Bass is limited to the situation and  
21 the -- the facts that it dealt with. Slover, which  
22 has come along since Bass, recognized the --  
23 recognized Bass. And nine years later Slover comes  
24 along says, well, you have a intervening force, but  
25 it's not a superseding cause if the defendant's

1 negligence creates the very risk of harm that  
2 caused the injury.

3 So we're dealing with a latter -- a later  
4 case in Slover. It's an appellate case. And it --  
5 it explains an additional situation that can  
6 pertain to the issue of superseding, intervening  
7 events.

8 The same argument, Your Honor, applies to  
9 the additional language. The intervening event is  
10 not a superseding cause when the defendant's  
11 conduct increases the foreseeable risk of a  
12 particular harm occurring through a second actor.  
13 And that is also supported by the Slover and  
14 quoting the Anteveros case.

15 MR. LI: What -- what -- well, Bass -- Bass  
16 deals with -- you know -- it's a Supreme Court  
17 case. And it deals with auto accident. And it's a  
18 manslaughter case where the defendant claimed as an  
19 intervening event the actions of her passenger and  
20 another driver. And the Court found that the  
21 appropriate language is the -- is the language  
22 that's in instruction 203.

23 Slover is a case where somebody fell out  
24 of their car and drowned in a creek. And so  
25 cases -- as I said, the cases throughout the

1 country have recognized that the exact mechanism of  
2 death when you have an auto accident because you're  
3 drunk is not -- you know -- it's not required that  
4 the -- that the state prove that -- that the exact  
5 mechanism of death or drunk driving death is -- is  
6 necessary.

7 This is a very different case. This is  
8 as -- as we're drive -- as they're drive -- as a  
9 drunk driver is driving down the road or a driver  
10 is driving down the road and there's another person  
11 on the other side and they're poisoned inside their  
12 car. That's a completely different case.

13 And the -- the other point I would make,  
14 Your Honor, is if you read the -- the proposed  
15 language here, it again conflates the mens rea  
16 necessary for negligent manslaughter -- negligent  
17 homicide versus manslaughter, reckless  
18 manslaughter.

19 Again we have in here -- you know -- an  
20 intervening cause is not the superseding cause if  
21 negligence creates the very risk of harm.  
22 Negligence is actually not defined in any of the  
23 statutes. I -- I -- or in any of the instructions.  
24 I presume what the state means is just regular,  
25 plain, old, vanilla negligence, not criminal



1 negligence.

2 So now we're going to have in a -- in  
3 a -- in a manslaughter case, a reckless  
4 manslaughter case, we're going to have the  
5 reckless -- the criminal recklessness definition,  
6 the criminal negligence definition for the  
7 negligent homicide, and then some garden variety  
8 negligence just -- just for this extra instruction  
9 here so that the jurors can understand what it  
10 actually means.

11 I don't think jurors are going to be able  
12 to segregate all of those different mens rea, civil  
13 and criminal. And that's -- that is one of the  
14 major problems of this particular case is that, in  
15 our view, it's, essentially, a civil case that's  
16 been bootstrapped into a criminal case. And the  
17 sort of -- I don't want to -- I mean, I don't mean  
18 it dumbing down. But the sort of lowering of the  
19 standard to the absolute lowest possible burden  
20 that the state can find is not in -- in -- in -- is  
21 not in keeping with due process. And -- and this  
22 instruction is just plain wrong.

23 MR. HUGHES: And, Your Honor, I would disagree  
24 that Slover is limited only to a drunk driving  
25 case. It is no more limited to A drunk driving

1 case than State versus Bass is limited to an auto  
2 accident manslaughter case.

3 Slover dealt with the situation where the  
4 drunk driver crashed the vehicle and the victim was  
5 ejected and wound up drowning in a nearby creek.  
6 And the defense in that case argued that the  
7 drowning in the creek was an intervening act that  
8 was somehow a break in the causal chain.

9 THE COURT: I think they argued that the  
10 passenger was intoxicated and that was part of it  
11 too.

12 MR. HUGHES: They -- I think that was part of  
13 the argument. They -- they said we don't know how  
14 he got in the creek, but maybe he crawled in the  
15 creek and drowned in the creek.

16 But Slover stood for the fact, and the  
17 Court addressed those issues, and stood for the  
18 fact that if the defendant's negligence, the  
19 crashing of the vehicle, the ejecting of the  
20 passenger, results in the very risk of harm that  
21 causes the injury -- in this case the drowning --  
22 then it's not an intervening force that's a  
23 superseding cause.

24 That's a situation that is supported by  
25 the facts in this particular case, as is the

1 additional language, which comes from the same  
2 paragraph in Slover. An intervening event is not a  
3 superseding cause when the defendant's conduct  
4 increases the foreseeable risk for particular harm  
5 occurring through a second actor.

6 Mr. Li says, well, we're going to have to  
7 instruct the jury in civil negligence, criminal  
8 negligence. Certainly the jury needs to be  
9 instructed in criminal negligence, which will be  
10 defined to them as -- as -- as negligently caused.

11 They'll have a definition for "negligence,"  
12 although the definition of "negligence" --  
13 "criminal negligence" is a higher -- requires  
14 higher proof by the state than civil negligence.

15 In the interest of simplifying the jury  
16 instructions, the state has no objection to  
17 instructing the jury on criminal negligence, which  
18 is a higher showing by the state than civil  
19 negligence would be that would comport with the  
20 Slover decision.

21 MR. LI: Essentially, this is an instruction  
22 intended to take away the superseding, intervening  
23 instruction. And there is a -- the -- the  
24 superseding, intervening instruction is in there.  
25 It has very specific elements. The jurors can

1 figure out whether -- whether the -- the -- the  
2 issue -- you know -- whether the superseding,  
3 intervening event was foreseeable and whether or  
4 not the state has proven beyond a reasonable doubt  
5 that it did not cause the death.

6 That instruction is -- is -- you know --  
7 based on State v. Bass. It's a very clear  
8 instruction and it makes sense. This particular  
9 instruction is -- is not necessary. It's not  
10 supported by the case law. The drunk driving cases  
11 are very different than this particular case,  
12 Your Honor. And -- and -- you know -- again, it  
13 does have the tendency to conflate the different  
14 types of mens rea for the two different offenses.

15 I guess I would like some clarification  
16 for the record from the state on this particular  
17 issue. Under this instruction if the jury found  
18 that organophos -- let's just assume for the second  
19 that the jury found organophosphate poisoning --  
20 you know -- was a -- that the state did not prove  
21 beyond a reasonable doubt that organophosphate  
22 poisoning killed these folks -- or didn't kill  
23 these folks. Would the fact that the state believe  
24 Mr. Ray ran the sweat lodge in a negligent  
25 manner -- would that nevertheless result in

1 Mr. Ray's guilt?

2 In other words, assume for a second that  
3 the state proved that Mr. Ray was running a sweat  
4 lodge negligently, and let's assume for a second  
5 the jurors just believed that it was possible that  
6 organophosphates killed the -- killed the victims.  
7 Would the state now take the position that -- that  
8 he -- that -- that it's not a superseding,  
9 intervening cause because Mr. Ray ran it  
10 negligently?

11 MR. HUGHES: Your Honor, in response to that,  
12 I think that moves us into the -- into the  
13 instructions on the additional page dealing with  
14 creation of peril, the duty pertaining to creation  
15 of peril. If you'd like, I can begin that or if  
16 you want to conclude with this one first.

17 THE COURT: I actually want to go all the way  
18 back to -- to the one we started with on  
19 transferred intent. I -- I know I indicated I was  
20 going to read some cases, and there was some  
21 argument. And the next thing I knew, we were  
22 talking about intervening, superseding cause.

23 But I was going to ask you, Mr. Hughes,  
24 going back to page 3 and -- and transferred intent.  
25 I see it this way. Trial has been almost four

1 months. And -- and I want the instructions to be  
2 correct instructions. It's vital in any case. But  
3 time is going to be spent so that there are correct  
4 instructions to this jury to the extent we can  
5 control that.

6 But, Mr. Hughes, I want to return to  
7 page 3. What I'd like you to do is it's really  
8 what Mr. LI was suggesting with regard to  
9 intervening causes. I'd like you to -- to fill  
10 that out under 3.2 there at the bottom. And  
11 what -- how would -- how would the argument fit  
12 that? I mean, how would your argument fit that  
13 type of transferred intent?

14 MR. HUGHES: Your Honor, the argument, as I  
15 see that it would be projected, would fit that  
16 intent issue in that in this case I think there's  
17 substantial evidence that the jury can find that  
18 Mr. Ray intended for people to have an altered  
19 mental state and perhaps to pass out inside the  
20 sweat lodge.

21 The jury can infer that that result of  
22 the altered mental state and then passing out is  
23 supported both by the -- the statements that he  
24 made before the sweat lodge, statements that he  
25 made during the sweat lodge, and his conduct in

1 running the sweat lodge.

2 The actual result, which is heat stroke,  
3 that the victims suffered from is -- occurred in a  
4 manner -- the actual result, heat stroke, is where  
5 this paragraph 2 applies. It involves a similar  
6 injury or harm. In other words, the -- the passing  
7 out is from heat stroke as the probable result and  
8 occurs in a manner which the person knows or should  
9 know is rendered substantially more probable by  
10 such person's conduct.

11 So it's -- it's the state's belief that  
12 this instruction will allow the jury to determine  
13 that with respect to the victims beginning to  
14 suffer and suffering from heat stroke, the  
15 defendant can be inferred to have that intent if  
16 the jury finds that he intended to cause and pass  
17 out due to heating their bodies up to the point  
18 where they would pass out.

19 MR. LI: Your Honor, if I could just  
20 substitute some words into this -- this  
21 instruction, it would be -- it would then read,  
22 under the -- the state's theory, the death involves  
23 a similar injury or harm as the altered state and  
24 occurs in a manner which the person knows or should  
25 have known -- or should know is rendered

1 substantially more probable by such person's  
2 conduct, i.e., holding the sweat lodge ceremony.

3 THE COURT: That's the --

4 MR. LI: I just don't see that.

5 THE COURT: That's the useful exercise as I  
6 see in trying to see if the instructions apply.

7 MR. HUGHES: Your Honor, the language Mr. LI  
8 inserted is not the language I was arguing.

9 THE COURT: Well, that's -- that's -- that's  
10 what I want to hear. But this is the -- what I  
11 mean. Plug right in the argument.

12 MR. HUGHES: I would say the heat stroke  
13 involves a similar injury or harm as the altered  
14 mental state or passing out.

15 THE COURT: I need to stop. Isn't the result  
16 under the homicide statutes death?

17 MR. HUGHES: That is the result under the  
18 homicide statute. But we're -- this particular  
19 instruction deals only with causation, so the  
20 result of the act. And that's one of the steps  
21 along the way to the element of the death, which is  
22 in the manslaughter statute.

23 MR. LI: Causation is -- I mean, in -- in --  
24 in the definition, causation is the -- conduct is  
25 the cause of a result, and the result is death

1 for -- for this. You know, it's written in the  
 2 neutral language because it's supposed to  
 3 accomplish a lot -- you know -- be usable for a lot  
 4 of different stat -- a lot of different crimes.  
 5 This one happens to be manslaughter involving  
 6 death.

7 So these instructions should be intended  
 8 to deal with the actual crime that's been alleged.  
 9 So the argument would have to be that the death  
 10 involved similar injury -- involved similar injury  
 11 or harm as the altered state and occurs in a manner  
 12 which -- you know -- et cetera.

13 THE COURT: Mr. Hughes, you disagree with  
 14 that? You're saying what's compared is heat stroke  
 15 and altered state, not death and altered state?

16 MR. HUGHES: Your Honor, with -- yes. The  
 17 manslaughter statute is -- is -- obviously is a  
 18 different statute than causation. And in this  
 19 particular statute of causation, it's talking about  
 20 the cause of an act, and it's explaining when a  
 21 person has intent to cause one act and results in  
 22 actually causing a different result, which is  
 23 similar, with the similarity being what is defined  
 24 in paragraph 2.

25 This is the causation which takes us part

1 way along to the recklessly causing the death.  
 2 Again, for manslaughter or for negligent homicide,  
 3 for that matter, the state doesn't have to prove  
 4 intent. What we're dealing with is recklessness or  
 5 negligence or the state of mind.

6 But to get to that point, it -- it -- it  
 7 requires a series of proof by the state, which  
 8 are -- if you think of it as bricks in the road,  
 9 this statute -- if you look at it as requiring that  
 10 the ultimate result, which is death, be manifested  
 11 immediately by the -- by the first act of the  
 12 defendant, I'm not sure you'd ever get there in a  
 13 reckless case. You have to show a series of  
 14 reckless acts.

15 For example, in the -- in a -- a reckless  
 16 DUI case, the drinking, which is drinking to a  
 17 point where you get very drunk and then the getting  
 18 behind the wheel of the car and then driving the  
 19 car, and then -- you know -- then you actually  
 20 strike somebody.

21 So if you try and piecemeal particular  
 22 facts out, sure. A defendant who drinks and only  
 23 drinks, I don't think the state could ever prove  
 24 that the ultimate result, the death of somebody on  
 25 the highway, would ever occur. Or a person who

1 gets behind the wheel of the car, if you take that  
 2 in isolation and you ignore the drinking beforehand  
 3 or the intoxication, you don't get to the  
 4 ultimate -- the ultimate result.

5 MR. LI: Your Honor, the problem with that  
 6 reasoning is exactly what we pointed out in our  
 7 Rule 20 motion, which is that most of the reckless  
 8 manslaughter cases -- reckless homicide cases --  
 9 excuse me. Reckless manslaughter cases involve  
 10 actions that are so obviously dangerous and likely  
 11 to cause death. Swinging a knife around, things  
 12 like that. And the -- and the acts are easy to  
 13 identify. I don't think -- I think actually it's  
 14 not very hard for a prosecutor to identify what the  
 15 act is in a reckless manslaughter, drunk driving  
 16 case. That's actually not a very difficult thing  
 17 for the state to prove, and they probably prove  
 18 them up here all the time.

19 THE COURT: Okay. Thank you.

20 Now, I'm -- I'm -- got the arguments on  
 21 the transferred intent. I'll look at cases there.

22 Now, let's go to the intervening,  
 23 superseding cause argument. And -- and I -- I have  
 24 the arguments. I don't know if there's anymore to  
 25 state.

1 Mr. Hughes, again, for this particular  
 2 version of the -- of the instruction, I think  
 3 the -- the defense, essentially, has the standard  
 4 instruction.

5 MR. HUGHES: Your Honor, actually the defense  
 6 has, I think, reworded and -- and altered the  
 7 standard -- the standard RAJI 2.03. With respect  
 8 to our case, again, we have situation that didn't  
 9 occur in Bass. And -- and to -- to -- to put into  
 10 context against facts that might be argued, the  
 11 intervening force, i.e., a victim passing out  
 12 inside the sweat lodge, is not a superseding cause  
 13 if the defendant's negligence created the very risk  
 14 that the victim was going to pass out and cause the  
 15 injury.

16 That's a sort of argument that the state  
 17 should be allowed to make. It's supported by  
 18 Slover, and it's -- it's an appropriate statement  
 19 of law in this particular case.

20 MR. LI: And, Your Honor, if I could just  
 21 identify --

22 THE COURT: To clear up Mr. Hughes' point,  
 23 you're saying "pass out," but you're attributing  
 24 to -- to what?

25 MR. HUGHES: If -- if the jury finds that the

1 person passing out inside the sweat lodge, becoming  
2 unconscious inside the sweat lodge, is a result of  
3 the defendant's negligence, the key -- the heating  
4 up of the lodge, the too hot of a condition, the  
5 advising people to ignore the feelings you're going  
6 to feel, you're going to be fine, stick it out,  
7 those sort of things.

8 If the jury finds that the defendant's  
9 negligence caused the person passing out, it would  
10 be inappropriate for the defense to argue, well,  
11 they passed out and they died after they passed  
12 out. That passing out is an intervening act that  
13 protects the defendant.

14 Similarly with the -- with the next one,  
15 the intervening event is not a superseding cause  
16 when the defendant's conduct increases the  
17 foreseeable risk of a particular harm occurring  
18 through a second actor.

19 Your Honor, I think that would apply in a  
20 very -- very similar set of situation where, for  
21 example, the second actor, someone who doesn't --  
22 we've heard a lot of testimony about people sitting  
23 by not doing anything.

24 And in this particular case we've got --  
25 again, the jury has heard sufficient evidence to

1 believe that the defendant's conduct, both in  
2 running the lodge, in placing people inside in the  
3 physical state as, I believe, Mr. Mehravar, for  
4 example, testified -- you know -- I just didn't  
5 feel like I could help anybody. I couldn't help  
6 anybody inside the lodge, when he was asked, well,  
7 would you save my life or would you save somebody  
8 else's life? That -- that is the sort of situation  
9 that the paragraph beginning around line 14 on  
10 page 4 addresses.

11 THE COURT: I -- I didn't know that passing  
12 out from heat would -- would be an argument as to  
13 intervening cause. It -- it would be if there was  
14 another agent involved is when that would come in.  
15 I -- I -- I -- so I have some confusion on that.

16 Mr. Li.

17 MR. LI: Yeah. I mean, that's the question I  
18 posed to Mr. Hughes, which I know he wants to defer  
19 to the duty arguments. But I think the question  
20 is, is it the state's position that -- let's assume  
21 all their medical experts took the stand and said,  
22 yep. We agree it's organophosphates. Would it be  
23 the state's position that because the defendant,  
24 Mr. Ray, performed the sweat lodge in a negligent  
25 manner, he's nevertheless liable under this section

1 here for -- you know -- reckless manslaughter when  
2 the cause of death was not heat stroke but, in  
3 fact, organophosphates?

4 And under this instruction that's --  
5 that's what this would be. It wouldn't -- this  
6 wouldn't be a superseding cause.

7 MR. HUGHES: Except under Mr. Li's argument,  
8 there wouldn't be defendant's negligence creating  
9 the very risk of harm.

10 MR. LI: Well, creating the sweat lodge,  
11 running the sweat lodge. I just don't understand  
12 what the state's position is. So I'm asking what  
13 the state's --

14 THE COURT: And I -- and I think Mr. Hughes  
15 indicated before I took things back to transferred  
16 intent why he believed it was necessary to discuss  
17 the creation of peril in conjunction with this.

18 Didn't you mention that, Mr. Hughes?

19 MR. HUGHES: I did. Although I don't believe  
20 it's in conjunction. I see it as a very separate  
21 issue than this particular issue. Under this issue  
22 the -- if the intervening force, as Mr. Li is  
23 arguing, say, was organophosphates and it was --  
24 there was no -- no doubt that it was  
25 organophosphates, the state would still have to

1 prove that the defendant's negligence created the  
2 very risk of harm that caused the injury. In other  
3 words, the defendant somehow was involved with  
4 the -- the use of the organophosphates. And -- and  
5 I don't think that -- and certainly that's not what  
6 the state's implying.

7 This instruction deals with people  
8 passing out in the lodge, people getting to the  
9 point where they don't feel like they're able to  
10 leave the lodge, the -- the lethargy, the altered  
11 mental state or maybe right before the passing-out  
12 stage, that sort of instruction, which I know we're  
13 going to get to eventually on the defendant's  
14 requested freewill instruction. That's the issue  
15 that we expect the defense is going to argue is an  
16 intervening force or an intervening act in this  
17 particular case.

18 And if the defendant's negligence creates  
19 the very risk that people are going to pass out or  
20 people are going to be heated to the point where  
21 they are in a state of lethargy and they don't try  
22 and leave or they are -- they are misled to the  
23 point where they think that the symptoms they're  
24 feeling are good things that are going on with them  
25 because they've been told that you're going --

1 you're going to feel these things but you're going  
2 to be fine, don't worry about them, that would be  
3 negligent conduct that would supersede the inter --  
4 the alleged intervening force of victim staying in  
5 the sweat lodge for whatever reason the victim may  
6 have stayed in.

7 MR. LI: Your Honor, the problem with this  
8 instruction is that -- I mean, I hear what  
9 Mr. Hughes is arguing. That's not really what the  
10 instructions says. And it's -- it's -- I hear that  
11 Mr. Hughes says, well, it doesn't apply to  
12 organophosphates and -- and what have you. But if  
13 you just simply read it, it doesn't -- it doesn't  
14 get you there.

15 The real issue is was there a  
16 superseding, intervening cause and was it  
17 foreseeable by the defendant? And that's -- that's  
18 what was -- was dealt with -- you know -- by the  
19 Arizona Supreme Court. And that's why -- you  
20 know -- the jury instruction is drafted the way it  
21 is.

22 The problem with -- you know --  
23 insinuating some sort of, quote, unquote, negligent  
24 operation of a sweat lodge introduces -- it  
25 introduces a whole host of confusing issues of

1 standard of care, which this Court has already  
2 ruled that there -- there is no recognized standard  
3 of care for sweat lodges.

4 What does it mean to run a sweat lodge  
5 properly? I know the state wants to argue that  
6 there's all these other sweat lodges that were  
7 run -- you know -- in this loving way and that  
8 there were only four rounds and that's the standard  
9 of care in every sweat lodge everywhere.

10 I will note for the record that their  
11 very last witness testified that his buddies had  
12 gone to a bunch of sweat lodges that were run by --  
13 you know -- other folks and that they were -- you  
14 know -- they were -- folks were passing out, that  
15 it was a chance to see God. I mean, I think he --  
16 you know -- they were all extreme. So I don't  
17 think the state has actually established what it  
18 purports to have established.

19 And the problem is that  
20 this instruction -- you know -- that talks about  
21 negligence provides some -- you know -- creates  
22 some idea that there's some general standard of how  
23 to run a sweat lodge.

24 The state needs to identify what the  
25 actual action was -- you know -- what the -- I

1 mean, this is the same as the Rule 20 argument,  
2 Your Honor. The state needs to identify what the  
3 conduct is and what the -- what the mental state  
4 that is connected to that conduct. What is it?  
5 This -- this -- this sort of add-in here merely  
6 confuses the already somewhat difficult to  
7 understand instruction.

8 And, Your Honor, for the record, just  
9 so -- so the Court knows what -- what the  
10 modifications were that -- that the defense made,  
11 one is in section 2 of -- of ours, which is at  
12 page 3. We just -- we clarified what it means.  
13 You know, we clarified that section. We made it  
14 applicable to the -- the -- the offense.

15 The way the -- the -- the standard  
16 instruction reads, the relationship between the  
17 conduct and result satisfies any additional causal  
18 requirement imposed by the definition of "offense."  
19 That's a pretty hard sentence to understand.

20 We changed it to, Mr. Ray must have  
21 engaged in alleged causal conduct with a reckless  
22 mental state. That's the -- that's what has to be  
23 proven as defined by -- and then we just gave the  
24 jury instructions.

25 THE COURT: And that's the only change?

1 MR. LI: That's the -- that's the only change  
2 to that paragraph. And the last we added a -- a  
3 sentence at the end. If you find that the state  
4 has not proven beyond a reasonable doubt that the  
5 superseding, intervening event did not cause death,  
6 you must find Mr. Ray not guilty of the crime  
7 charged in that particular count.

8 And -- and there's -- we just added that  
9 sentence after. The state must prove beyond a  
10 reasonable doubt that a superseding, intervening  
11 cause -- event did not cause the death.

12 Yeah. We can -- we can give you a track  
13 changes, Your Honor, if that's helpful. The track  
14 changes, we could -- you know --

15 THE COURT: No. I'm noting it. I see the two  
16 spots.

17 MR. LI: That's it. That's it. I think -- I  
18 think we added some "ands" and "ands" and "ors." I  
19 mean, we've -- we've capped "and," "ands," and  
20 "ors" we added.

21 MR. HUGHES: Your Honor, in response to  
22 Mr. Li's argument, I would submit a question back  
23 to him. Does the defense intend to argue that  
24 people passing out inside or people who feel unable  
25 to leave and do not leave -- is that an intervening

1 act that the defense intends -- superseding,  
 2 intervening act -- is that something that they  
 3 intend to argue?  
 4 MR. LI: I -- I -- I guess I would love an  
 5 answer first from the state as to whether or not --  
 6 which they still haven't answered -- with whether  
 7 or not, if the evidence were proven, that all of  
 8 the decedents died of organophosphate poisoning, if  
 9 every witness agreed to that, would Mr. Ray still  
 10 be guilty under this instruction? That's what I'd  
 11 like to know.

12 MR. HUGHES: I don't think this instruction,  
 13 again, would apply unless there is evidence that  
 14 the defendant's negligence created the very risk of  
 15 harm, which the facts would not support under their  
 16 organophosphate hypothesis because that organo --  
 17 there's no evidence the defendant knew about  
 18 organophosphates. His negligence would not create  
 19 risk of harm of -- the very risk of harm, in other  
 20 words, the risk that people would die of  
 21 organophosphates.

22 But it would apply -- Mr. Li's fact  
 23 summary -- scenario would apply under the  
 24 creation-of-peril duty on the other page.

25 And having answered the question, I'd

1 again ask Mr. Li --

2 MR. LI: I don't -- I don't think he's  
 3 answered the question, Your Honor, because here's  
 4 the problem: When you look at the -- the actual  
 5 instruction requested by the state, it doesn't  
 6 actually say what Mr. Hughes is -- is claiming it  
 7 says. It just says the defendant's negligence  
 8 creates a very risk. And there's no  
 9 foreseeability, nothing, in there.

10 It's literally just, if the defendant ran  
 11 a sweat lodge negligently which creates the risk of  
 12 harm, because those people are all inside the sweat  
 13 lodge now -- I mean, Mr. Ray -- you know -- said  
 14 all these things. Stay in there. Stay in there.  
 15 He created the sweat lodge. All his folks went in  
 16 there. And then they all die of organophosphate  
 17 poisoning. Let's -- let's assume those facts for a  
 18 second. This instruction would say, you know what.  
 19 That's an intervening force.

20 MR. HUGHES: And -- and again that --

21 THE COURT: Doesn't particular harm kind of  
 22 take care of that, Mr. Hughes?

23 MR. HUGHES: I think it does. When you look  
 24 at what criminal negligence is defined as, it says,  
 25 with respect to the result or to the circumstances

1 defining an offense, the person fails to perceive a  
 2 substantial and justifiable risk that that result,  
 3 death by organophosphates, would occur.

4 And I -- I think you can't look at the --  
 5 that proposed hypothetical question by Mr. Li in a  
 6 vacuum without looking at the fact the jury is  
 7 going to have a criminal negligence and also the  
 8 instruction and also the instruction for  
 9 manslaughter and negligent homicide.

10 Again, the state's concerned, and I don't  
 11 think Mr. Li has responded yet, is does the defense  
 12 intend to argue that persons who remain inside,  
 13 either because they're unconscious or because  
 14 they've gotten to the point where the heat has worn  
 15 them down so they don't leave -- is that a  
 16 superseding, intervening act that the defense  
 17 intends to argue?

18 MR. LI: I can -- I mean, if the -- if the --  
 19 I mean, first of all, we don't have to -- I mean,  
 20 this is the State's case here. The state has the  
 21 burden of proof. And typically defense -- the  
 22 defense is not required to -- to sort of tell the  
 23 state exactly what the defense is going to be.

24 With all of that said --

25 THE COURT: Whatever you want to do. I didn't

1 ask the question, Mr. Li.

2 MR. LI: Okay. And then -- so then I'm -- you  
 3 know -- I will say this: I think it's very  
 4 unlikely that I'm going to get up there and say  
 5 that -- I think the last part of what Mr. Hughes  
 6 said, something about people being unconscious.

7 THE COURT: Again, to intend to argue that  
 8 persons who remain inside either because they're  
 9 unconscious or they've gotten to the point where  
 10 the heat has worn them down so they don't leave, is  
 11 that a superseding, intervening event?

12 MR. LI: It's hard for me to imagine a defense  
 13 attorney who would make that particular argument.  
 14 It is on -- on the other hand, the argument of free  
 15 will and that people's decision to entertain  
 16 whatever they want to do is -- is clearly been a  
 17 theme of this case. But beyond that I don't think  
 18 the state has any right to -- to ask.

19 THE COURT: Okay. Then let's move ahead.

20 MR. LI: Your Honor, just one last thing.

21 Again, under that proposed sentence, what is the --  
 22 the actus reus that the -- that the state wants to  
 23 argue in that particular sentence? What is it? Is  
 24 it negligently running the sweat lodge? What is  
 25 it?

1 MR. HUGHES: This sentence does -- this  
2 section does not pertain to -- necessarily to the  
3 defendant's conduct so much as pertains to the  
4 effect of an intervening force on.

5 So I think to answer Mr. Li's question,  
6 you have to know what is the intervening force that  
7 the defense, which is -- the intervening force is  
8 potentially a -- would be a defense in this case,  
9 it's going to depend on what is the intervening  
10 force that's being alleged to be for the jury to  
11 determine is it a superseding cause or is it not a  
12 superseding cause?

13 So I can't answer the question unless --  
14 I've given the hypothetical, for example, of  
15 someone who passes out inside or someone who  
16 remains inside. And I've given my hypothetical of  
17 what I believe the evidence showed that would  
18 support the defendant's negligence with respect to  
19 that intervening force.

20 MR. LI: And -- I'm sorry, Your Honor.

21 THE COURT: I was just going to say I think  
22 that when a party is a proponent of a special  
23 instruction, I need to know the facts that would  
24 justify what the special instruction as  
25 distinguished from the RAJI. It just should

1 cover -- you know -- the case. And normally they  
2 do.

3 But -- so I think it is appropriate when  
4 we get to your instructions. If you're asking for  
5 a special instruction, I'm going to want to know  
6 the factual --

7 MR. LI: Sure.

8 THE COURT: -- predicate for that, Mr. Li.

9 MR. LI: Well, and -- and -- I appreciate  
10 that, Your Honor. And I think that's -- that's  
11 true and fair. And when you ask me questions about  
12 what our specials, I'll -- I'll tell you what --  
13 how -- how they work.

14 The other problem with this instruction  
15 is that -- remember, it's the state's burden to  
16 prove beyond a reasonable doubt that a superseding,  
17 intervening event did not cause the death. That is  
18 absolutely the -- the law of this state. So  
19 this -- this proposed instruction without any  
20 definition is -- is -- vitiates the latter.

21 Yeah. And Miriam sent me this note,  
22 which is exactly right. I mean, intervening -- and  
23 it's not force. It's an event -- is not an  
24 affirmative defense. It's part of the state's  
25 burden.

1 MR. HUGHES: Your Honor, the language  
2 "intervening force" comes directly from Slover. We  
3 were trying to use very precise language. The  
4 state would have no opposition to changing that to  
5 intervening event.

6 But we've given our explanation of how we  
7 believe that instruction would apply. Again, it  
8 would be if the -- we believe it would allow the  
9 jury to have the law explained to it as set forth  
10 in Slover and interpreting whether some act, such  
11 as a person remaining inside when they are -- are  
12 distressed by the heat to the point where they  
13 don't leave or where they passed out, that would be  
14 the intervening force that we believe would be  
15 covered under the Slover situation.

16 And with respect to the defendant's  
17 negligence, that, again, is going to be discussed  
18 as far as the duty with -- with respect to on the  
19 additional pages. But the negligent acts would be  
20 the controlling of the heat, the increasing the  
21 heat inside, the increasing the humidity, the  
22 telling people don't worry about how your body  
23 feels. Don't worry about feeling like your skin  
24 burning. Don't worry about feeling like you're  
25 going to die. Concentrate on yourself. Don't

1 worry about others.

2 Those are the sort of acts, the actual  
3 affirmative acts, by the defendant that would apply  
4 under a situation that we believe is contemplated  
5 in this particular case, which we believe created  
6 the very risk of harm which would cause the injury.

7 THE COURT: You've -- you've asked two forms  
8 of intervening event/force instructions, the other  
9 having to do with second actor. There has been  
10 some argument on that as a proponent. What -- what  
11 do you mean by that if you would put into concrete  
12 terms your -- your argument that would fit the  
13 facts from the case that you would advance?

14 MR. HUGHES: Your Honor, there -- there are a  
15 number of facts in the case that -- that people did  
16 not -- did not help other persons. There are facts  
17 in the case that, for example, when -- when Liz  
18 Neuman was in a poor state, for example; and there  
19 was the relation of what her condition was to  
20 Mr. Ray, the person may not have relayed  
21 information accurately -- you know -- beyond just  
22 asking Liz, are you okay, but not relaying the  
23 other things that they were hearing about Liz.  
24 The -- the labored breathing, things along those  
25 lines. So that could be considered as harm that

1 occurred to Liz through a second actor through the  
2 person that she was leaning up against.

3 There may be an argument that -- a  
4 similar argument, for example, to Kirby Brown, that  
5 people took an affirmative actions on Kirby Brown  
6 and maybe made her condition worse or certainly  
7 didn't make her condition any better by -- you  
8 know -- moving her body inside the sweat lodge.

9 If there's an argument such as that but  
10 the fact that these people are acting  
11 inappropriately is a superseding cause that the  
12 defense wants to argue about, no one else helps,  
13 for example, which is, I think, a theory that was  
14 explored through quite a few of the witnesses on  
15 the stand.

16 Mr. Mehravar, I think, was the most  
17 poignant. He was asked, well -- you know -- would  
18 you save somebody if you knew they were dying? And  
19 he would say -- you know -- something along the  
20 words of, under those circumstances I really don't  
21 think that I would.

22 That's the sort of second actor that the  
23 state is concerned about. And if they are in that  
24 situation because of Mr. Ray's negligent conduct,  
25 then I believe it would apply as well.

1 THE COURT: Mr. Li.

2 MR. LI: Your Honor, I mean, I believe the  
3 Court and the state heard the opening -- my opening  
4 statements and -- and heard the Rule 20 argument.  
5 And with relation to what the various people next  
6 to the various decedents is, the argument is of  
7 knowledge. And -- and the argument has always been  
8 in every witness that we've had, if you had known,  
9 wouldn't you have done something? That's been the  
10 argument.

11 The fact that Mr. Mehravar -- you know --  
12 is sort of a strange person and a bit of an outlier  
13 in that he feels that he has to say that he doesn't  
14 know what he would do, that's a -- that's a  
15 different issue.

16 But we're not blaming him for what  
17 happened. He's -- he's not responsible for what  
18 happened. He just didn't know. Nobody knew. And  
19 that's the argument that we've always consistently  
20 made.

21 So if that's the state's concern, we've  
22 consistently argued from the beginning of this  
23 case -- remember the whole what would you do,  
24 ladies and gentlemen, if the person next to you  
25 were dying and you knew that? That was my opening

1 statement. You'd help them.

2 And the -- and the point has always been  
3 because you know. It shows that you knew that  
4 somebody was dying. Of course you would help them.  
5 And nobody knew. And that's been the whole point  
6 of -- of every argument and every cross-examination  
7 that we've made.

8 So this instruction as articulated by --  
9 the need for which, as articulated by Mr. Hughes,  
10 is unnecessary because that's not the argument.  
11 The argument has always been one of knowledge. And  
12 the fact that 50-plus reasonable people didn't know  
13 that people were dying demonstrates that -- that --  
14 the lack of knowledge.

15 THE COURT: Mr. Hughes, let's move forward  
16 through your instructions.

17 MR. HUGHES: Your Honor, I believe the  
18 definitions -- I'm not sure there's going to be  
19 very much dispute about that. I think where we may  
20 start to have disagreements is at the beginning of  
21 the paragraph on the bottom of page 4 that starts  
22 with, to find the defendant guilty. That needs to  
23 be read in -- in sync with what's on the following  
24 page. But that's the preamble that would apply to  
25 either two duties that are cited on the other page

1 and are correct statements of law.

2 Obviously the jury needs to find that the  
3 defendant owed a duty if they're going to find the  
4 defendant guilty of the crime for a failure to  
5 perform an act. So I believe that the paragraph on  
6 page 4 is an accurate statement of the law.

7 With respect to the creation-of-peril  
8 duty, I argued that --

9 THE COURT: I don't want to get too far ahead.

10 MR. HUGHES: Okay.

11 THE COURT: Try to see if there is an  
12 agreement on the first three definitions and what  
13 we need to say about that, bottom of page 4.

14 MR. LI: Your Honor, we don't agree on any of  
15 this.

16 THE COURT: Okay. That's -- that's what I  
17 want to find out before we get too far ahead. You  
18 don't think there should be any --

19 MR. LI: No, Your Honor. Because all of this  
20 is hinging on some discussion of the duty. And --  
21 and it's all hinging on the fourth paragraph,  
22 which -- which I think we need to address in  
23 conjunction with all of the other ones.

24 THE COURT: "Conduct" is a definition that  
25 applies to standard definitions of cause as well.



1 So I don't think it applies just to duty.  
 2 But what -- what strikes me from the  
 3 start is the last -- the last statement there on  
 4 page 4. I don't think the jury finds the duty.  
 5 The jury determines whether or not there's a breach  
 6 of the duty, I think. I mean, it's basic tort  
 7 principles that --

8 MR. HUGHES: We believe the Court must first  
 9 find the duty. But once the Court finds it, we  
 10 believe it could invade the province of the -- of  
 11 the jury not to let them find that it exists. And  
 12 the Court can instruct the jury on what the duty  
 13 is.

14 If the defense agrees that it's only for  
 15 the Court to find if a duty exists and then the  
 16 jury finds does it apply, we would be fine with  
 17 that. However, we believe it could be error if we  
 18 take that finding away from the jury after the  
 19 Court acts as a gatekeeper of is there a duty at  
 20 all.

21 So I see it as two situations. The Court  
 22 needs to find the fact that there's a duty before  
 23 it's presented to the jury. But the state does not  
 24 want to invade the province of the duty. If that's  
 25 a finding, the jury also needs to make the finding

1 by applying the facts to the law.

2 And to make that finding, the jury would  
 3 have to have an idea of this is what the duty may  
 4 be, and then this is the situation where the duty  
 5 may give rise.

6 And the jury, I believe, needs to apply  
 7 the facts to the law. If the defense would want to  
 8 agree that that's not the case, then we would  
 9 submit it to the Court to determine what the duty  
 10 is and then with the defendant's agreement, submit  
 11 that to the jury to find was the duty violated or  
 12 not.

13 THE COURT: The briefing on the question of  
 14 whether or not Mr. Sundling would testify talks  
 15 about the sports cases and coach -- coaching cases.  
 16 And I wondered at the time how the jury ultimately  
 17 was instructed. I don't think it was readily  
 18 apparent from the decision you can see how that was  
 19 done.

20 But the -- those cases stress that the  
 21 Court determines whether or not there's a duty.  
 22 And the coaching of the coach/instructor line of  
 23 cases, then the jury question became whether or not  
 24 there was an increase in inherent risk. And I  
 25 think somehow that was given to the -- to the jury.

1 But they didn't determine the duty  
 2 initially. And -- and the case has spent a lot of  
 3 time talking about what a tricky issue that can be  
 4 to have the Court decide that and whether an expert  
 5 can help the Court decide that. That was discussed  
 6 there too. Because it's the -- it's the Court's  
 7 decision and it's something that should be  
 8 apparent.

9 But then there was another case that  
 10 indicated that an expert could assist the Court in  
 11 some circumstances to decide whether or not there  
 12 was a duty, which in that case was a determination  
 13 of what were the inherent -- inherent risks. And I  
 14 guess as a legal question was there -- was there  
 15 enough evidence that the risks were increased and  
 16 then give it to the -- to the jury.

17 But that -- I don't -- the jury doesn't  
 18 determine duty.

19 MR. LI: And, Your Honor, this instruction,  
 20 just -- this instruction, essentially, says -- if  
 21 you read it, it just, essentially, says to find the  
 22 defendant guilty, you must find a duty. And then  
 23 it says on the next page, the defendant has a duty  
 24 to do this. And the second -- second duty says,  
 25 oh. And the defendant has a duty to do this.

1 So the Court is, essentially, saying --  
 2 you know -- giving it to the province of the jury  
 3 and then telling the jury that the defendant has a  
 4 duty.

5 Before we get too far into this, though,  
 6 Your Honor, I have to assert the due-process  
 7 argument issue here. This is the first time that  
 8 the defense has been notified -- not -- not today.  
 9 But -- but the -- the -- the -- on June 6 in the --  
 10 in the -- you know -- Rule 20 briefing and then on  
 11 June 7 in the Court's ruling, it's the first time  
 12 that there's been any discussion of an actual duty  
 13 owed by -- identified or owed by Mr. Ray  
 14 personally, as opposed to JRI, to any person that's  
 15 not been vitiated by the waivers that all of these  
 16 adults entered into.

17 And we -- we finished the case. And now  
 18 we're dealing with this duty argument. And I have  
 19 to reassert the due-process issue. The Arizona  
 20 Constitution requires that the defendant be made  
 21 aware of the nature and cause of the accusations  
 22 against him when there's time to form a full and  
 23 appropriate defense.

24 If the state had wanted to make some sort  
 25 of argument about duty and how Mr. Ray had somehow

1 violated some duty, they probably -- not probably.  
 2 They should have identified that duty long, long  
 3 ago at the beginning of the case, not -- not on  
 4 June 6 after the close of evidence, and not after  
 5 they've denied even the need to prove a duty  
 6 outside of the criminal statute.

7 And then to ask for a jury instruction  
 8 after they denied the -- the need for -- to prove a  
 9 duty compounds the error.

10 I'd also note the State v. Von Reeden, 9  
 11 Ariz. App. The defendant must have sufficient  
 12 information to distinguish each of the counts and  
 13 prepare for his defense. And in all of the cases  
 14 that we cite in our brief at page 8 -- this is our  
 15 Rule 20 brief at page 8, footnote 3. State v.  
 16 Puryear, notice given on the day before trial is  
 17 insufficient. And there's a whole bunch of other  
 18 cases that we've cited in -- in that footnote that  
 19 relate to the due-process requirements.

20 I have to put that on the record. I know  
 21 the Court has made its ruling. And the idea that  
 22 we could then bootstrap -- you know -- after the  
 23 close of evidence, after the state has denied that  
 24 it even owes -- has to prove any duty at all, then  
 25 to have an instruction -- to have this Court

1 actually instruct the jurors about a purported duty  
 2 would be error.

3 The other thing I'd say is this,  
 4 Your Honor, just to -- just to deal with the  
 5 limited legal issue here. Under -- if this were a  
 6 civil case and -- and the question was -- you  
 7 know -- did Mr. Ray breach some duty that he owed  
 8 to the participants, and, therefore, that breach --  
 9 was that breach of duty negligent and did it cause  
 10 injury and should they be compensated, we could --  
 11 you could absolutely instruct the jurors about the  
 12 duty. You could ask them to find whether or not he  
 13 breached the duty and whether it caused injury,  
 14 et cetera.

15 All of the standard civil cases -- the  
 16 standard civil requirement that happen every day in  
 17 courts all over the place -- I've spent a lot of  
 18 time litigating these kinds of things. And that is  
 19 a normal thing to do in a civil litigation. It is  
 20 not normal to import that entire civil apparatus  
 21 into a criminal case and then have -- none of the  
 22 cases that we've -- we've dealt with and -- you  
 23 know -- that are criminal cases involving  
 24 recklessness or omissions and all of those things,  
 25 none of those cases involve the jurors being

1 instructed, hey, you got to find some duty. And if  
 2 you find the duty, then you've to find whether  
 3 there was a breach. And if you find a breach, then  
 4 you've got to find it caused some harm. That's not  
 5 what the -- that's not how these work. And it  
 6 would be error to import all of this in.

7 The other point I would make is the  
 8 special relationship duty that the -- the state has  
 9 now identified today, which is June 10, comes from  
 10 the Restatement of Torts Third. I'm not sure -- we  
 11 would have to do more research on this. But we  
 12 don't know -- we don't believe the Restatement of  
 13 Torts Third has been accepted by any case law  
 14 anywhere. But this is, again, a new duty  
 15 introduced today, June 10. That's another  
 16 violation of due process.

17 MR. HUGHES: Your Honor, with respect to the  
 18 defendant's due-process allegation, the state  
 19 responded to that allegation with respect to the  
 20 Rule 20. I think the Puryear case and actually the  
 21 Far West case dealt with similar situations.

22 And with respect to the State's case,  
 23 there has been full disclosure of all the police  
 24 report, all the facts underlying this case to the  
 25 defense. The indictment in the case made it clear

1 to the defendant what he's being charged with, the  
 2 names of the victims. There has been no  
 3 due-process violations.

4 Mr. Li indicates the special relationship  
 5 is being first argued today. That was raised in  
 6 the Sundling -- or the state's response on the  
 7 Sundling issue that was filed back in May. It's  
 8 restated a little bit in here. But the argument  
 9 and the authority for that argument for the most  
 10 part came directly from the state's response to the  
 11 Sundling issue.

12 The creation-of-peril duty was -- as the  
 13 Court and Mr. Li would recall, was raised in the  
 14 state's Rule 20 response.

15 MR. LI: Your Honor, it is not the case that  
 16 disclosure of discovery and an indictment that  
 17 simply says -- you know -- somebody caused the  
 18 death of somebody recklessly is notice for purposes  
 19 of Rule -- of -- of the due-process clause as to  
 20 what the duty is.

21 We are not required to guess what duty  
 22 the state thinks its evidence proves. That's just  
 23 not the law. We could have mounted a very  
 24 different case had the state identified earlier  
 25 what that duty was. And, frankly, Your Honor, had

1 they not done what I would call a "head fake" and  
 2 say that, in fact, they don't even owe a duty -- I  
 3 mean, they don't even have to show any duty outside  
 4 of the criminal statute, that's the problem. Is  
 5 that when the State of Arizona files briefing  
 6 saying that they don't have to show a duty outside  
 7 of the criminal law and then to say, oh, but you  
 8 should figure out from the discovery that we've  
 9 given you, the police reports and indictment, the  
 10 other duty that we've been kind of hiding in our  
 11 back pocket, that is not appropriate disclosure or  
 12 notice under the due-process clause. And it would  
 13 be error to accept that argument.

14 I think that's one of the most frankly  
 15 disingenuous arguments I've every heard a  
 16 government lawyer make.

17 THE COURT: We're going to take a break here.  
 18 (Recess.)

19 THE COURT: The record will show that Mr. Ray  
 20 is present and the attorneys are present.

21 And we were about to talk about creation  
 22 of peril. And Mr. Li brought up a due-process  
 23 argument relating to lack of or late notice of  
 24 alleged duty.

25 We can go ahead and talk about creation

1 of peril. I don't know that you put that in the  
 2 form of a direct motion, Mr. Li. At this point you  
 3 certainly put everyone on notice of -- of your  
 4 concern with that. You didn't phrase it in terms  
 5 of a motion.

6 MR. LI: Well, I mean, it -- it is -- forms  
 7 the basis for our objection to these particular  
 8 instructions.

9 THE COURT: Okay.

10 MR. LI: And -- and to the extent that --  
 11 listen, I mean, Your Honor, with all -- with --  
 12 with due respect, it also would be a motion for a  
 13 mistrial on that basis to the extent that the --  
 14 the Court wants to entertain the idea that -- that  
 15 the jury would be instructed with these particular  
 16 duties.

17 THE COURT: I'll -- I'll deny a motion for a  
 18 mistrial. I -- I mentioned in another context that  
 19 it would seem that that duty would be raised in a  
 20 Rule 20 context. And it -- it has been, as well.  
 21 But again, I'll denying the motion. But I'll note  
 22 that as an objection to the instruction despite  
 23 any -- there might be in addition to any mechanical  
 24 problems as well, tactile problems.

25 Mr. Hughes.

1 MR. HUGHES: Your Honor, with respect, then,  
 2 to the specific duties, if I can back up just a  
 3 minute. Again, on the issue of -- of the Court or  
 4 the jury or both determining the existence of the  
 5 duty, just for the purpose of the record, it's the  
 6 state's belief that both need to find that.

7 We've looked very quickly to try and find  
 8 some case law that's illustrative of the published  
 9 opinions. And the only one I can find at this  
 10 point would be State versus Brown, which is -- and  
 11 it's the Brown case that was cited in the state's  
 12 response to the Rule 20.

13 THE COURT: Is that the nursing home?

14 MR. HUGHES: It's the nursing home case. And  
 15 I point the Court to page 349. And -- and they --  
 16 they don't discuss the issue directly, but they do  
 17 say -- they do give the jury instruction that was  
 18 given in that case. And they say the trial court  
 19 gave the following instruction on the issue of  
 20 duty, if any, owed by appellant to A.R., who I  
 21 guess was the victim.

22 And the instruction starts out, before  
 23 the defendant can be found guilty of either  
 24 negligent homicide or manslaughter, there must  
 25 exist a legal duty owed by the defendant to A.R.

1 Then the Court says, such a duty exists if any of  
 2 the following conditions have occurred. And they  
 3 set forth, then, the state's theories of duties.

4 No. 1, for example, the defendant failed  
 5 to obey a Court order to cease providing -- I think  
 6 should it say care and lodging for A.R. or, 2, the  
 7 defendant agreed to provide care, shelter,  
 8 necessities to A.R. And then the list goes down.

9 Again, it's the state's position that the  
 10 Court as a matter of law and for the jury  
 11 instructions needs to determine that a duty exists.  
 12 But the jury needs to look at the facts and say  
 13 does the duty exist under the facts as we know them  
 14 and the instruction that the Court gives so we  
 15 don't invade the purview of the jury.

16 MR. LI: And, Your Honor, for the record, that  
 17 case was postdated by Gibson, the Arizona Supreme  
 18 Court case, by almost 30 years or so. And the  
 19 Gibson case explicitly finds that the question of  
 20 the duty is solely the Judge's call and does not  
 21 depend on factual findings and should not be  
 22 submitted to the jury for factual findings relating  
 23 to the duty.

24 MR. HUGHES: And, Your Honor, again, Gibson is  
 25 a civil case, and -- and so I -- I have difficulty

1 seeing the -- the defendant's arguments. The  
 2 defendant, I think, is arguing that the jury should  
 3 just be instructed, you don't get to have a say in  
 4 this. This is the duty. What we're saying is to  
 5 just -- to protect the defendant, they need to find  
 6 is there a duty and then was it breached.

7 And I do believe, again, that's in -- in  
 8 keeping with the Arizona constitutional provision  
 9 that -- that requires the jury to determine issues  
 10 of fact. I think we've made our record on that,  
 11 Your Honor.

12 THE COURT: I just recall this debate that  
 13 academics had in the field of tort law that dealt  
 14 with whether duty really isn't just proximate cause  
 15 and vice verse. And there were articles about  
 16 that, maybe texts that dealt with that.

17 And if you -- if you talk in terms of  
 18 proximate cause, that is a jury issue. These are  
 19 difficult concepts when you really -- really think  
 20 about them. But creation of peril. I can read  
 21 that and then I can make a decision.

22 Is there any further argument on that?

23 MR. HUGHES: Your Honor, as I read it, we were  
 24 rushing to put this together. And I see that  
 25 there's a typographical error. The last bit of

1 language is repeated twice. We believe the  
 2 instruction should end with, or when the situation  
 3 resulted from the defendant's conduct, period.

4 And, Your Honor, on this issue of duty  
 5 and jury instructions pertaining to duty, we did  
 6 scramble to prepare these proposed instructions.  
 7 The state would ask for some additional time over  
 8 the weekend to -- we're not going to add  
 9 necessarily. But we would like to maybe do a  
 10 little more research.

11 These are preliminary, in other words.  
 12 We were operating under the belief that the defense  
 13 was going to run through the end of the week and --  
 14 and we'd have at least the weekend to make some  
 15 determinations about jury instructions.

16 THE COURT: We'll have to talk about timing.  
 17 I've got some work to do on instructions myself.

18 MR. LI: And, Your Honor, I know the Court  
 19 doesn't need me to make this argument, but this is  
 20 essential. These two instructions are,  
 21 essentially, instructing the jury to find -- well,  
 22 actually, it's just the Court saying -- informing  
 23 the jury that there is, in fact, a duty. There are  
 24 two of them. That's what these instructions say.

25 THE COURT: And I'll bring this up in this

1 context because it came up before with regard to a  
 2 request for an oral instruction to the jury during  
 3 trial. And I'm always reluctant to give what I  
 4 consider to be a theory of the case instructions,  
 5 as well. I think that's something that -- that  
 6 needs to be watched.

7 But I'm going to look at the law. And  
 8 there's the Brown case where there's precedent for  
 9 giving a duty instruction if it's -- if it explains  
 10 the law and can be done in a neutral fashion and  
 11 it's a correct statement of the law. So --

12 MR. HUGHES: And, Your Honor, with respect to  
 13 the neutral fashion, I think that's one thing -- if  
 14 we work on this this weekend, it would be my intent  
 15 to create something that's more along the neutral  
 16 fashion of the instruction in State versus Brown.

17 I think as this is written, it's -- to me  
 18 it's clear that -- that the jury has to find the  
 19 facts to impose the duty, but I -- I believe a more  
 20 passive or neutral presentation of the duty and the  
 21 facts that create the duty, such as set forth in  
 22 Brown, would be more appropriate.

23 MR. LI: And, Your Honor, just with respect --  
 24 since we're talking about duty -- well, I'll wait  
 25 and see if there's more.

1 THE COURT: Pardon me?

2 MR. LI: Yeah. We're talking -- since we're  
 3 talking about duty, and I -- I am alerted by the  
 4 state's Rule 20 response that I believe it's now  
 5 the state's position that under the  
 6 creation-of-peril duty, that even if it were  
 7 absolutely the case that all of the folks who  
 8 passed away died of organophosphate poisoning,  
 9 if -- if the jury finds -- I believe this probably  
 10 is the state's argument. If the jury finds that  
 11 Mr. Ray created that peril by having a sweat lodge  
 12 ceremony, that Mr. Ray is -- is guilty of negligent  
 13 or reckless homicide irrespective of whether or not  
 14 it was toxins that killed them or it was heat that  
 15 killed them.

16 That -- that seems to be what their brief  
 17 is writing -- or has written. And irrespective of  
 18 whether or not the conduct, quote, unquote, was  
 19 tortious or innocent. So it appears that at least  
 20 in the state's Rule 20 argument, and maybe that's  
 21 going to be their argument before the jury and to  
 22 this Court, that it doesn't matter whether or not  
 23 Mr. Ray did something innocent or tortious in his  
 24 conduct so long as that conduct put folks in peril,  
 25 i.e., by putting them in the sweat lodge. It

1 doesn't matter whether or not these folks died  
2 of -- of organophosphate poisoning or heat.

3 I think that's what the state's position  
4 is. And I attempted -- attempted to elicit that  
5 from Mr. Hughes in the causation instruction. He  
6 deferred that conversation to the duty area. So I  
7 think we might as well address that now.

8 THE COURT: If -- if the toxin -- if a toxin  
9 caused the result, caused the deaths, is there any  
10 conduct or omission at all by the defendant,  
11 Mr. Ray?

12 Mr. Hughes.

13 MR. HUGHES: Your Honor, I think looking at  
14 the language cited in the Maldonado opinion and --  
15 which comes from the Tubbs case, it talks -- it  
16 talks about the fact that -- and the language is  
17 more or less cited here. But if the defendant's  
18 use of an instrumentality would make victims -- or  
19 the defendant's conduct or an instrumentality under  
20 the defendant's control causes the victims to fall  
21 into that situation of peril and helplessness, then  
22 the defendant has an affirmative duty to act to aid  
23 them.

24 In this case, it's the state's belief  
25 that when the victims inside the sweat lodge began

1 to be in a position of helplessness and peril, the  
2 defendant did nothing.

3 We still have to meet the elements of the  
4 reckless manslaughter that showing of a gross  
5 deviation and the -- and -- and the other elements  
6 of reckless manslaughter with respect to the  
7 omission that begins at that point in time when the  
8 defendant becomes aware of the fact that these  
9 people are in a situation of peril and  
10 helplessness.

11 We believe the evidence establishes that  
12 for whatever reason they got sick, and we do  
13 believe the evidence establishes beyond a  
14 reasonable doubt that it was not organophosphates  
15 that made these victims ill. But if the defendant  
16 became aware that they were helpless and in a  
17 position of peril, he had a duty at that point to  
18 do what was reasonable to aid them, and he did not  
19 do that.

20 He continued the ceremony. When the  
21 ceremony ended, he went outside. He went over and  
22 sat down in a chair after he was cooled down.  
23 That's what the evidence is. It's that conduct and  
24 that failure to act by the defendant that would  
25 then trigger the reckless manslaughter statute.

1 So that's the situation -- the creation  
2 of peril as it would apply to a -- a fact situation  
3 similar to that raised by Mr. Li.

4 MR. LI: So I just want to make this record  
5 absolutely clear. And -- and I -- I would -- I  
6 note page 36 and 37 of the -- of the state's  
7 response to our Rule 20 motion, which states, thus,  
8 if the jury determines the sweat lodge, which was  
9 under defendant's control, caused the victims to  
10 become helpless and in danger and the jury  
11 determines that a reasonable person should  
12 recognize the necessity of aiding or protecting the  
13 victims to avert further harm, defendant's duty to  
14 the victim arises even if the condition of peril  
15 rose from something in the lodge other than heat  
16 and humidity, paren, such as carbon dioxide,  
17 organophosphates, and the lodge materials, et  
18 cetera. Comment A makes it clear that the duty is  
19 imposed even if the defendant was not originally at  
20 fault.

21 So this is a new theory, Your Honor, just  
22 for the record, that now says that if -- if the  
23 defendant ran the sweat lodge, essentially, and  
24 that other -- and that he should have recognized  
25 a -- a necessity of aiding and protecting the

1 victims to avert further harm, the duties defendant  
2 to the victim -- sorry. The defendant's duties to  
3 the victims would arise even if the cause of death  
4 were something else and even if the defendant was  
5 originally not at fault, which is what this -- this  
6 states.

7 So this is a -- a very new theory of  
8 criminal liability. Not only is it new in the law,  
9 but it certainly is new in this case.

10 MR. HUGHES: Your Honor, I don't believe it's  
11 new. We addressed that issue in -- in our briefing  
12 in the written response. Maldonado has been the  
13 law in Arizona since 1981. That's 30-some years  
14 ago. The restatement that it cites -- I'm not sure  
15 when Section 322 was applied, but it's quoted in  
16 the Tubbs case, and the Tubbs case is from 1967.  
17 These are not -- these are not new theories.

18 Tubbs is an Indiana case, but it -- Tubbs  
19 is -- is what quotes the restatement. I don't know  
20 how old that restatement provision is. But at  
21 least in Arizona that provision that people have a  
22 duty to help others if their conduct or something  
23 in they control harms them has been around for 30  
24 years in this state at a minimum.

25 MR. LI: Those are both civil cases, No. 1,

1 Your Honor. But No. 2, the -- the -- it goes to  
2 particular duty now cited by the state. And just  
3 for the -- again, Mr. Hughes -- this -- this was  
4 cited by the state on June 6.

5 It is a new duty under Arizona law in  
6 general. It's a new duty articulated by the state,  
7 in particular in this state, and it now purports to  
8 argue that even if Mr. Ray's conduct was originally  
9 not at fault, that had he recognized the -- the  
10 need for this, it doesn't even matter what caused  
11 these folks to die. And now he's responsible no  
12 matter what.

13 And there's simply no defense anymore.  
14 It just literally doesn't matter what caused these  
15 people to die or whether it was foreseeable that  
16 the Hamiltons might have used some  
17 organophosphates. It just doesn't matter anymore.

18 THE COURT: I would like to spend a few  
19 minutes on the request for Willits.

20 MR. KELLY: And, Judge, if I could make a  
21 different request in regards to schedule. If we  
22 can reserve some time to speak about the scheduling  
23 of rebuttal witnesses, if any, and settling the  
24 jury instructions, time for closing arguments,  
25 et cetera.

1 THE COURT: We -- we do need to do that. What  
2 I'd like is the three proposed exhibits.

3 Does the clerk have those --

4 MR. LI: Yeah.

5 THE COURT: -- 1084 and --

6 MR. LI: 1084 through 86.

7 THE COURT: I want to make sure I have those  
8 this weekend. Check them out. I'm going to listen  
9 to those this weekend.

10 Then with regard to scheduling, there  
11 aren't a lot of extra requested instructions by --  
12 by the parties here. But they involve important  
13 and some of them complex issues.

14 Mr. Kelly, you brought it up. What do  
15 you suggest or what are you saying about  
16 scheduling?

17 MR. KELLY: Well, Judge, I think the -- first  
18 inquiry is whether there's going to be a rebuttal  
19 witness. Let's assume for a moment there's not.  
20 Then the second question is would you be ready to  
21 instruct the jury with final instructions at 9:15  
22 on Tuesday? And in all candor, it doesn't appear  
23 to me that that would be possible.

24 I just heard from the State of Arizona  
25 that they intend to yet submit another draft of

1 these duty instructions. So we're going to need  
2 time to respond to those.

3 So that's why I brought up the scheduling  
4 issue. I think the first inquiry, is there a  
5 rebuttal witness? And if not, is 9:15 Tuesday a  
6 realistic time?

7 THE COURT: Ms. Polk, I -- I thought you  
8 indicated that if the -- the Court were to permit  
9 some form of evidence on these three exhibits, in  
10 whatever form, you would want rebuttal?

11 MS. POLK: Yes, Your Honor.

12 THE COURT: And then Mr. Li has presented  
13 the -- the matter in a different form. And I don't  
14 know if you presented all the arguments on that,  
15 which is just -- they -- they just ought to be  
16 played. They were evidence in the case, and they  
17 ought to be played at -- at closing if the defense  
18 chooses to do so.

19 Isn't that your --

20 MR. LI: Yeah. Your Honor, that's all I want.

21 THE COURT: So if there's any further argument  
22 on that, that's what I'm looking at. So as I see  
23 it, in any event -- well, I guess if I denied that  
24 but said that you could still bring it in in  
25 another fashion -- I need to listen to them.

1 That -- that has to be decided.

2 But leave that -- that aside, Ms. Polk.  
3 Is that the only contingency with regard to your  
4 decision on whether there would be rebuttal?

5 MS. POLK: I believe so, Your Honor. There's  
6 one other witness, Sidney Spencer, that we're  
7 considering. But we just haven't made that final  
8 decision. It would not be lengthy if we went in  
9 that direction.

10 I think our primary concern right now is  
11 allowing these clips to -- well, I've made the  
12 argument already. I won't take the Court's time on  
13 that.

14 MR. KELLY: Your Honor, if I may reply briefly  
15 in regards to Ms. Spencer. Again, I would  
16 emphasize that rebuttal evidence under Arizona law  
17 is only permitted as to new evidence brought out in  
18 the defense case. We only presented Ms. Sy, a  
19 criminalist, and Dr. Paul, medical examiner.

20 THE COURT: That's what I was going to say.  
21 Two experts have testified.

22 MR. KELLY: So I'm not sure -- I -- I -- I  
23 happen to be the attorney that four months ago  
24 prepared the cross-examination of Sidney Spencer  
25 when she was originally identified in the first

1 week. And I do the remind the disclosure and my preparation indicates that she is not a medical doctor. She's a rancher in southern Arizona. So I don't know what special expertise she would have to rebut the testimony of Dr. Paul. And -- and she's not a criminalist as well.

7 THE COURT: I think Tuesday morning at least is just not a good prospect to -- I really need to know if at all possible if there's going to be rebuttal witness. If there isn't, then the defense would rest and we would go right into instructing and -- and closing arguments.

13 If there's going to be brief rebuttal -- I guess it could -- it could still happen. Just the instructions would just have to be really complete and assume that the rebuttal witness would not alter what the appropriate instruct -- instructions would be.

19 Mr. Hughes or -- Ms. Polk, in terms of scheduling, then, what I don't want to do is have the jury come back for a five-minute rebuttal witness or something like that. It needs to be combined with the completion of the trial. So with that in mind -- and you're nodding so you agree with that.

1 Looking at Wednesday and trying to have that set in that fashion.

3 MR. LI: Wednesday for what? Closing or --

4 THE COURT: Well, if there's going to be rebuttal, I think it's being represented it would be extremely brief and then instruction and closing.

8 And I want to know how -- how much time people are going to be requesting for closing argument also.

11 MR. LI: I'm sorry, Your Honor. I didn't understand. So Wednesday -- the idea would be Wednesday for closing and -- you know -- resting, closing, and -- and -- I'm sorry. Resting, rebuttal --

16 THE COURT: Instructing and closing.

17 MR. LI: -- instructing and closing. I just wanted to understand.

19 THE COURT: Even with the proposal here, the -- the -- this isn't going to be anywhere near -- I've had cases where there are far more instructions than -- than will be read here. So I think that that -- it makes sense, then, to look -- look towards Wednesday. If you're planning a rebuttal witness, Ms. Polk, Wednesday morning.

1 And we'll just have to make contact with the jurors and let them know through the commissioner on Monday that they would be reporting at 9:15 on Wednesday.

5 Anything else?

6 MR. LI: And would we be using Tuesday to -- to do what?

8 THE COURT: To make sure we've got the instructions ready to go.

10 MR. LI: Now I understand. Thank you, Your Honor.

12 MR. KELLY: Judge, I -- I think we were discussing an approximate length of time for the closing arguments.

15 THE COURT: I wanted to hear about that too.

16 MR. KELLY: We're curious what the state's opinion is in that regard.

18 THE COURT: Okay.

19 MS. POLK: Your Honor, at this point I don't know. I would anticipate an hour to two hours, but I just -- I just don't know.

22 THE COURT: I was actually thinking -- looking at the instructions, probably a half hour to 40 minutes for reading those and preliminaries and then, basically, devoting the day -- dividing the

1 day between the two parties after that. That's what I thought would probably be requested.

3 Based on the arguments and the Rule 20, I was thinking about two and a half hours per side, something like that.

6 MR. LI: I think it'll be hard to accomplish that given the volume of evidence in this case.

8 THE COURT: Ms. Polk was saying two hours and so and --

10 MR. KELLY: Judge, I can tell you that Mr. Li and I contemplated about four hours a side. And what -- one thing I thought of -- I thought of is, and I've seen this before, and that is having the jury come earlier on that day, 8:00 or 8:30 instead of 9:15.

16 THE COURT: Still not going to get done in one day.

18 MR. KELLY: But it's closer. I mean, adds that 45 minutes. Of course, there have -- there has to be breaks and lunch hour. But shortening of lunch hour, starting earlier, comes closer to about a seven-hour day.

23 THE COURT: Ms. Polk, you don't think -- you would want anywhere approaching four hours, I take it?

1 MS. POLK: No, Your Honor.

2 MR. KELLY: Judge, of course, the state has  
3 the rebuttal closing.

4 THE COURT: And I've talk about that. It's  
5 understood the state would divide their time --

6 MR. KELLY: All right.

7 THE COURT: -- to get equal time.

8 MR. LI: I guess -- I mean, Your Honor, we've  
9 been on trial for four months. There have been a  
10 lot of issues that have come up. And -- and it  
11 would -- just given how long both sides argued at  
12 the Rule 20, and those were fairly -- fairly  
13 discrete issues. I think it was over 70 minutes a  
14 side. You know. And we weren't really going  
15 through the facts. There was a lot of time spent  
16 on the law.

17 I -- it's hard for me to imagine -- I can  
18 imagine doing it under four hours, but -- but it's  
19 hard for me to imagine -- you know -- one-hour  
20 closing for a four-month trial.

21 THE COURT: Okay. Well, I've told you what my  
22 initial thoughts were in terms of time. It was  
23 geared to having instruction and closing arguments  
24 in one day. Rebuttal evidence --

25 MR. LI: Could I make a suggestion,

1 Your Honor? Assuming for a second that there isn't  
2 rebuttal -- there is not a rebuttal case, is there  
3 a way we could instruct the jurors on Tuesday  
4 afternoon or something like that?

5 It seems to me we've pretty much put the  
6 issues in front of the Court relating to the jury  
7 instructions. You know, the defense has posed a  
8 few instructions, but they're not -- they're not  
9 complicated in the sense -- in the sense that they  
10 don't implicate these duty issues or other -- these  
11 other complicated legal issues that's state's  
12 instructions implicate. They're simply just  
13 illustrations of what "gross deviation" means or  
14 what "substantial and unjustifiable" means.

15 And -- and the Court can look at them,  
16 and they're supported by case law. I -- I don't  
17 think there's a lot of argument to be made about  
18 those particular instructions. And we think  
19 they're appropriate. But -- you know -- we can go  
20 through that on Tuesday.

21 THE COURT: Well, that's what we're talking  
22 about. I think at least the morning is going to be  
23 needed to finally settle these instructions.  
24 That's what I think -- at least the morning on  
25 Tuesday.

1 MS. POLK: I do, as well, Your Honor. And I  
2 think that I'd rather not bring the jury in Tuesday  
3 afternoon just to have them wait while we're trying  
4 to finalize and get things typed up. There's still  
5 a Willits instruction. I think it would be more  
6 considerate of the jury to bring them in Wednesday  
7 morning and then be ready for them.

8 MR. LI: I'm not trying to be inconsiderate of  
9 jurors. I just want to get this done. I mean, it  
10 seems like we don't have a lot -- I have five or  
11 six instructions. They are fairly straightforward.  
12 The Willits instruction is -- is -- I mean, the  
13 facts of this case surely require them. I know the  
14 state may have a different position on that. But I  
15 think we can -- we articulated in a briefing, and  
16 the Court can look at it over. I'm sorry.

17 THE COURT: I'm going to rule on the exhibits  
18 by Monday morning.

19 And, Ms. Polk, you can make a decision.  
20 If you're going to have rebuttal, then I guess  
21 Tuesday afternoon would be the time to do it. That  
22 way then we could -- then we could have an  
23 instruction conference in the morning, finalize  
24 that, have the rebuttal evidence and the -- and the  
25 instruction as well in the afternoon. At least

1 accomplish that much.

2 MR. LI: Your Honor, I just guess -- I just  
3 want some direction on one point, Your Honor.  
4 If -- if it's the Court's ruling that the exhibits  
5 can be played but are not admitted into evidence,  
6 is that something that would then permit the state  
7 to call Detective Diskin, Ted Mercer and whoever  
8 else to put -- purportedly put those tapes into  
9 context, notwithstanding the fact they've already  
10 testified about them? Would the -- would the state  
11 be allowed to rebut the fact that I'm -- I'm going  
12 to be playing something in closing? I just -- I  
13 just want to have some sense of that.

14 THE COURT: Well, that's what I mentioned,  
15 that possibility.

16 MR. LI: Well, I just want to know if that is,  
17 in fact, what the Court's -- and let's assume for a  
18 second that the Court rules that they are playable  
19 in closing but not admitted -- not admitted. Okay?  
20 Just playable in closing.

21 THE COURT: Uh-huh. No. There'd be nothing  
22 to rebut.

23 MR. LI: Okay. So the state would not be able  
24 to --

25 THE COURT: Then it would be based on the --



1 their -- them being admitted earlier. Yes.

2 MR. LI: And then -- so then, just so we're  
3 clear, I have not moved -- I -- because of -- I  
4 just -- I tried to be as straight with the Court  
5 and with the -- with the government as I can be.  
6 All I want to do is to have the option if I want to  
7 play those tapes in closing. So I'm perfectly  
8 willing to withdraw them, and I have withdrawn the  
9 offering of them as evidence if it will move this  
10 case to its conclusion.

11 THE COURT: I thought what we were dealing  
12 with now was the -- just the -- you're urging that  
13 they -- you should have the ability to play them  
14 because they were played for the jury anyway.

15 MR. LI: Correct.

16 THE COURT: That's the way I'm looking at it.

17 MR. LI: And that's why --

18 THE COURT: That's why I asked Ms. Polk if she  
19 wanted to elaborate on her argument. And she,  
20 basically, said, I think they're parallel. They're  
21 the same arguments I had before. The state would  
22 suffer the same prejudice or it would be the same  
23 issues, I think.

24 MR. LI: And -- and -- and we understand the  
25 argument. And the Court will -- will make whatever

1 ruling it's going to make. But assuming for a  
2 second the Court says that the defense can play  
3 these in -- if it chooses in its closing, play the  
4 evidence that was played in trial at closing, is  
5 the state then permitted to put on a rebuttal  
6 witness to put those various tapes into context  
7 when we're not even offering them as evidence  
8 anymore? And I just want to know what the --  
9 whether that's the case.

10 THE COURT: Again, just conceptually, I  
11 don't -- I don't know how that would happen because  
12 what would there be to rebut? There's nothing  
13 there. It would just all revert back to -- to what  
14 happened during the case in chief that the state  
15 put on.

16 MR. LI: Okay. And so the state's position  
17 is, basically, that -- you know -- it's Sidney  
18 Spencer or -- or no one, if that's correct.

19 MS. POLK: And, Your Honor, again, I'm not  
20 going to go through all the argument, but while the  
21 witnesses were on the stand, the defense did not  
22 offer audio clips into evidence. They played them  
23 for the limited purpose of impeachment. And now,  
24 after these witnesses are gone, no longer  
25 available, they want to create little clips to

1 highlight portions of the witnesses' testimony.

2 The witnesses' testimony is their  
3 testimony. But after the fact they want to create  
4 audio of witnesses' testimony, essentially, and  
5 play it for the jury.

6 What -- and there are several issues.  
7 But what they've done is taken something out of  
8 context, and they want to play that little piece  
9 out of context.

10 What the state would like to do, then, is  
11 to offer some audio clips to provide the context.  
12 And our -- we would offer an expanded audio clip  
13 that would include the information I read for the  
14 Court yesterday prior to the statement that Mr. Li  
15 wants to play and after. And then the state in our  
16 closing could play the expanded audio clip.

17 There's something inherently unfair about  
18 long after witnesses have come and gone to move  
19 something into evidence to be able to use it to --  
20 and play in closing. And if that's the direction  
21 that this -- this trial is going, that this case is  
22 going, what we would want to do is offer an  
23 expanded clip under Rule 106 so that the jury,  
24 then, has the benefit of the context that that  
25 limited clip is played in.

1 THE COURT: Ms. Polk, I'm assuming you intend  
2 to play some excerpts in closing, I would think?

3 MS. POLK: Yes.

4 THE COURT: And it happened in opening  
5 statements. And I -- I just have to say -- and I'm  
6 not saying how I'm ultimately going to rule. I'm  
7 going to listen to these recordings again. But you  
8 don't intend to play -- you're going to play what  
9 you want to play, and then the defense is going to  
10 make their arguments and play what they would  
11 normally play.

12 So we're in -- we're in closing arguments  
13 at this time. So the -- the novel issue -- and I  
14 don't have any law on this is -- what I indicated  
15 before, what also could have happened for a record  
16 is I could have asked that Mina make a record of  
17 what was said for impeachment. And then couldn't  
18 that impeachment be read back for that purpose too  
19 and -- that's -- that's why I said. Without the  
20 context, I -- is that what people are agreeing,  
21 that that came in only for impeachment? I mean, is  
22 that just the stipulation? I want to know that, if  
23 you stipulate to that. Because that can clear up a  
24 lot of legal --

25 MR. KELLY: Your Honor, it's impossible.

1 Because I played the clips during  
2 Detective Diskin's testimony. So I could not have  
3 impeached the detective with someone else's  
4 statement. It was the knowledge that the detective  
5 had on the date.

6 MR. LI: It's just like the organophosphates  
7 tape.

8 THE COURT: I tried to bring this up before.  
9 Ms. Polk says impeachment. Maybe some of them are  
10 of three. But --

11 MR. LI: They -- they -- they are all relevant  
12 as leads that the detective was provided.

13 MS. POLK: Your Honor, the state would request  
14 that -- first of all, we still have not been  
15 provided copies of the clips or -- or even  
16 directed to -- we just don't have them. They  
17 haven't given them to us. They played one for us  
18 yesterday, for the Court at the same time. We  
19 don't have any of them.

20 And then, secondly, I'm not doubting --  
21 if the representation is that they were played  
22 during Detective Diskin's testimony, I'm not  
23 doubting it. But I would just ask that the defense  
24 direct us to what portion of the record during  
25 detective's testimony which they were played so

1 that we can gather context that way.

2 MR. LI: Well, just -- just so we're clear,  
3 one thing we could do that would be perhaps helpful  
4 to the state is we'll just identify the transcript  
5 portion, send it over to them. It's the same --  
6 they're not new tapes. We've been sort of dealing  
7 with this particular set of clips for quite some  
8 time, as far back, I believe, as the 404(b)  
9 hearing.

10 But just because I played it -- I played  
11 the clips for Ted Mercer partially to impeach but  
12 also because some of the conversations he had --  
13 well, all of the conversations he had were with the  
14 police to show what the police were told. So it's  
15 not simply to impeach him -- it's not simply to  
16 impeach him, but it's also to say, and you told the  
17 police "X." And so they were aware that you were  
18 concerned about -- you know -- wood and rat poison.

19 MS. POLK: Your Honor, could the state be  
20 provided with copies of these new exhibits?

21 THE COURT: I -- well --

22 MR. LI: Yeah. We'll -- okay. Yes. Yes.  
23 We'll -- we'll -- they're digital -- we don't have  
24 them here, but we'll email them to you. You know  
25 what they are. I mean no offense.

1 MS. POLK: We would like copies.

2 MR. LI: We'll send them to you.

3 THE COURT: Last thing I want to bring up,  
4 what I'm planning on right now is resuming Tuesday  
5 at 1:30. The jury will be notified at this point.  
6 We'll see if that works. If I look at the  
7 instructions and I think it's going to take more  
8 time and it starts again Wednesday, that's just how  
9 it will be. But the jury will be at 1:30. I'm  
10 going to ask the parties to be here at 8:30.

11 MR. KELLY: And if there's no rebuttal  
12 witness, we'd go instructing the jury, again,  
13 closing arguments continuing Wednesday.  
14 Alternatively we do it Wednesday.

15 THE COURT: Yes.

16 MR. KELLY: Thank you.

17 MS. POLK: I'm sorry. I didn't hear what  
18 Mr. Kelly said.

19 THE COURT: I -- I have a hearing Thursday in  
20 another matter, another case in the morning.  
21 And -- and Tuesday I -- I also have another case to  
22 hear in the morning.

23 So it just -- it's a half hour,  
24 9:00 o'clock, Tuesday at 9:00. We'll just start  
25 then. So that'll clear that up.

1 MS. POLK: But are you still bringing this --  
2 I'm sorry to interrupt. Are you still bringing the  
3 jury in the afternoon?

4 THE COURT: Yes.

5 MS. POLK: And to do closings in the afternoon  
6 if we have time?

7 THE COURT: As much as we can get done,  
8 reading and then starting.

9 MS. POLK: And Judge, I realize it's 5:00.  
10 But here's the other issue that we have with these  
11 clips. All of the state's audio when we played  
12 them, the defense was given the opportunity to  
13 expand in order to provide context. I'm sure the  
14 Court and counsel recalls that. Every time we've  
15 had an audio, the Court required us to provide it  
16 ahead of time to the defense. They would come back  
17 and they would say we want this much more in. We'd  
18 have that conversation off the record. And then  
19 that's what would be admitted in.

20 We have not been provided that  
21 opportunity with these clips that all of a sudden  
22 at the last minute the defense wants in. That's  
23 how it's been done throughout this entire trial,  
24 and now suddenly there's this deviation where we  
25 are not being allowed to provide the context for

1 these clips.

2 And the defendant's statements themselves  
3 and the statement by Kirby Brown, all those that we  
4 played, as the Court will recall, the Court  
5 required us first to allow the defense to, under  
6 106, expand. We went back. We put more audio  
7 clips. We came back in, and in that form they were  
8 finally admitted.

9 MR. LI: We're not asking to admit. We just  
10 want the opportunity to play them so that when -- I  
11 can argue about them and -- and my argument isn't  
12 vitiated by the Court's instruction that what the  
13 attorneys say is not evidence. It's not a -- it's  
14 not that complicated.

15 MR. KELLY: Your Honor, and I have to say on  
16 my cross-examination of Detective Diskin, 106 was  
17 asserted. The state had the opportunity on  
18 redirect to put it in context. And my recollection  
19 is they did so, did so very well.

20 So these clips have been played. When  
21 they were played, the state was to allowed the  
22 opportunity to place everything in context.

23 THE COURT: The other matter I want to raise  
24 is request from media. And I think this has been  
25 considered by the attorneys informally to -- to

1 have the -- an additional camera. And it indicates  
2 that I guess both sides are, basically, not taking  
3 a position.

4 Ms. Polk, Mr. Hughes.

5 MS. POLK: Your Honor, the state has no  
6 position.

7 THE COURT: Mr. Li.

8 MR. LI: I don't have a position.

9 THE COURT: I'm going to permit the second  
10 camera.

11 Whoever needs to hear that, I hope you  
12 heard that. It will -- it will be permitted.

13 Thank you.

14 MS. POLK: Judge, just quickly going back to  
15 the issue of duty in the instructions. The Court  
16 had noted State versus Brown. I would just also  
17 note in the Far West case, it's paragraph 82, that  
18 might also be helpful to the Court. And there the  
19 Court discusses the instructions on the duty of  
20 that case that went to the jury.

21 THE COURT: Thank you. We'll be in recess.  
22 (The proceedings concluded.)

1 STATE OF ARIZONA }  
2 COUNTY OF YAVAPAI } ss REPORTER'S CERTIFICATE

3  
4 I, Mina G. Hunt, do hereby certify that I  
5 am a Certified Reporter within the State of Arizona  
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings  
8 were taken in shorthand by me at the time and place  
9 herein set forth, and were thereafter reduced to  
10 typewritten form, and that the foregoing  
11 constitutes a true and correct transcript.

12 I further certify that I am not related  
13 to, employed by, nor of counsel for any of the  
14 parties or attorneys herein, nor otherwise  
15 interested in the result of the within action

16 In witness whereof, I have affixed my  
17 signature this 24th day of July, 2011.

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MINA G. HUNT, AZ CR No. 50619  
CA CSR No. 8335

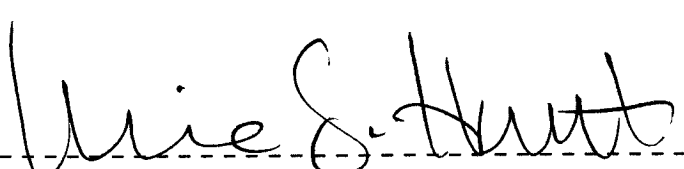
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